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APPENDIX

In The

Supreme Court of the United States

October Term, 1970

~~No. 1025~~ 70-77

STATE OF NORTH CAROLINA,

Petitioner

v.

WAYNE CLAUDE RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
Filed February 8, 1971
Certiorari Granted April 5, 1971

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In The

Supreme Court of the United States

October Term, 1970

NO. 1325

STATE OF NORTH CAROLINA,

Petitioner

v.

WAYNE CLAUDE RICE,

Respondent.

RELEVANT DOCKET ENTRIES

(1) July 2, 1968. Wayne Claude Rice was arrested on a charge of driving under the influence of alcohol.

(2) July 19, 1968. Wayne Claude Rice was tried upon the charge of driving under the influence of alcohol in the Buncombe County General Court (Asheville), North Carolina. Upon a finding of guilty, he was sentenced to a term of 9 months imprisonment, suspended upon payment of a fine of $100.00 and cost. Thereupon, Rice appealed to the Buncombe County Superior Court for a jury trial *de novo*.

(3) August 2, 1968. Wayne Claude Rice was afforded a jury trial *de novo* in the Buncombe County Superior Court before the Honorable Francis O. Clarkson, Judge of the Superior Court of North Carolina, and a jury. Upon conviction by the jury upon the charge of driving under the influence of alcohol, Rice was sentenced to a term of 2 years imprisonment.

(4) August 2, 1968. Upon appeal for jury trial *de novo* in the Buncombe County Superior Court, Wayne Rice plead guilty to 12 charges of uttering worthless checks,

and was sentenced by the Honorable Francis O. Clarkson, Judge of the Superior Court of North Carolina, to 12 consecutive 30-day terms of imprisonment. (These sentences ran concurrently with the sentence imposed for driving under the influence of alcohol.)

(5) September 6, 1968. Petition for post conviction hearing filed in the Buncombe County Superior Court.

(6) October 30, 1968. Wayne Claude Rice was provided a post conviction hearing pursuant to the provisions of the North Carolina Post Conviction Hearing Act, in the Buncombe County Superior Court, before the Honorable W. K. McLean, Judge Presiding. Rice was represented by Dennis Winner, Esquire, court-appointed counsel. By Order dated October 30, 1968, Judge McLean denied post conviction relief and the appointment of Dennis Winner, Esquire, court-appointed consel, was continued in order to file a Petition for Writ of Certiorari to the North Carolina Court of Appeals seeking to review Judge McLean's Order denying post conviction relief.

(7) November 22, 1968. Wayne Claude Rice withdraws his Petition for Writ of Certiorari to the North Carolina Court of Appeals.

(8) November 25, 1968. Wayne Claude Rice escapes from the custody of the North Carolina Department of Correction and remains on escape until captured on November 27, 1968.

(9) December 6, 1968. Wayne Claude Rice is convicted of escape in the Buncombe County General Court and sentenced to a term of 4 months imprisonment to commence at the expiration of the sentences imposed for driving under the influence of alcohol and upon the 12 charges of uttering worthless checks.

(10) December 11, 1968. Application for Writ of Habeas Corpus filed in the United States District Court for the Western District of North Carolina—Asheville Division.

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(11) December 24, 1968. Memorandum and Order filed by the Honorable Woodrow W. Jones, Chief Judge of the United States District Court for the Western District of North Carolina, dismissing the Application for Writ of Habeas Corpus due to the Petitioner's failure to have exhausted available State remedies and upon the further ground that the Application asserted no claim upon which relief could be granted.

(12) January 6, 1969. Notice of Appeal filed in the United States District Court for the Western District of North Carolina seeking review of Judge Jones' Memorandum and Order filed December 24, 1968, denying habeas corpus relief.

(13) December 8, 1969. Certificate of Probable Cause entered by the Honorable John D. Butzner, Jr., Judge of the United States Court of Appeals for the Fourth Circuit.

(14) December 10, 1969. Wayne Claude Rice completes the service of the sentence imposed in the Buncombe County Superior Court upon conviction of driving under the influence of alcohol and commences service of the sentence imposed December 6, 1968, upon conviction of escape in the Buncombe County General Court.

(15) January 24, 1970. Wayne Claude Rice is released from the custody of the North Carolina Department of Correction having completed the service of the sentence imposed for escape and having previously completed the service of all other sentences upon which he had been committed to the North Carolina Department of Correction.

(16) May 8, 1970. Oral arguments heard in the United States Court of Appeals for the Fourth Circuit.

(17) November 16, 1970. Opinion of the United States Court of Appeals for the Fourth Circuit filed in the case of WAYNE CLAUDE RICE v. STATE OF NORTH CAROLINA. No. 13,425 (434 F. 2d 297).

(18) November 24, 1970. Order entered by the United States Court of Appeals for the Fourth Circuit staying mandate in the case of WAYNE CLAUDE RICE v. STATE OF NORTH CAROLINA, No. 13,425 (434 F. 2d 297).

(19) February 8, 1971. Petition for Writ of Certiorari filed in the Supreme Court of the United States by the State of North Carolina in STATE OF NORTH CAROLINA v. WAYNE CLAUDE RICE, No. 1325. October Term, 1970.

(20) April 5, 1971. Petition for Writ of Certiorari granted by the Supreme Court of the United States in STATE OF NORTH CAROLINA v. WAYNE CLAUDE RICE, No. 1325, October Term, 1970.

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE SUPERIOR COURT

STATE	)	
	)	
vs.	)	ORDER
	)	
WAYNE CLAUDE RICE	)	

THIS CAUSE coming on to be heard, and being heard, before the undersigned, Judge Presiding, upon a Petition heretofore filed for a Writ of Review, and it appearing to the Court that the defendant has asked that the sentence imposed by the Superior Court be vacated and that in its place the sentence imposed by the General County Court be put into effect, on the theory that that was the maximum the Superior Court could give under the circumstances;

And it appearing to the Court that the defendant was tried in the General County Court of Buncombe County, North Carolina, on the 19th day of July, 1968, upon a charge of operating a motor vehicle upon one of the public highways of this state while under the influence of intoxicating liquors, was found guilty and thereafter the following sentence or Judgment was pronounced:

> "That the defendant be confined in the State Department of Corrections for 9 months; said prison sentence suspended for a period of two years upon condition the defendant violate none of the criminal laws of the State or Federal Government; that he not operate a motor vehicle upon the public highways of the State of North Carolina for at least twelve months or while his license are suspended or revoked; that he surrender his operators license to the Clerk for suspension—pursuant to statute and pay a fine of $100.00 and the cost."

That the defendant gave notice of appeal to the Superior Court of Buncombe County and thereafter, to-wit: on the 2nd day of August, 1968, the defendant was tried before a jury in the Superior Court of Buncombe County, North Caro-

lina, was convicted and the following Judgment was pronounced by His Honor, Francis O. Clarkson:

> "It is the Judgment of the Court that the defendant be confined in the North Carolina Department of Corrections for a period of two years."

Upon the foregoing the defendant contends as a matter of law that the Superior Court could not sentence a defendant to a longer period of time or to a larger fine than was given in the General County Court of Buncombe County, but could only pronounce an identical sentence or a lesser sentence.

It is the opinion of the Presiding Judge upon this hearing that the Superior Court of Buncombe County was not bound by the Judgment of the General County Court of Buncombe County, North Carolina, and that the defendant is not entitled to have the Judgment of Judge Clarkson stricken out and a like Judgment of General County Court pronounced.

IT IS, THEREUPON, ORDERED, ADJUDGED AND DECREED that the petitioner's Writ of Review be denied; that the defendant be returned to the custody of the State Department of Corrections for the completion of his sentence.

This, the 30th day of October, 1968.

/s/ W. K. McLean
JUDGE PRESIDING

To the foregoing Judgment the defendant in apt time, in open Court, gives Notice of Appeal to the Court of Appeals. Further notice waived. Defendant is allowed 60 days within which to make up and serve Case on Appeal, and the Solicitor for the State is allowed 45 days thereafter in which to file Exceptions or serve Counter-Case. Appeal bond in the sum of $100.00 is adjudged sufficient; provided, however, the defendant shall execute an affidavit of his indigency that he may in that event appeal to the Supreme Court or to the Court of Appeals In Forma Pauperis.

It is further considered, order and adjudged that the Honorable Dennis Winner continue as defense counsel in the Case

on Appeal under the Order heretofore entered.

This, the 30th day of October, 1968.

/s/ W. K. McLean
JUDGE PRESIDING

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

CASE NO. 2995

WAYNE CLAUDE RICE, Petitioner.	)	
	)	MEMORANDUM
vs.	)	and
	)	ORDER
STATE OF NORTH CAROLINA, Respondent.	)	

THIS CAUSE coming on to be heard before the undersigned, United States District Judge, and being heard, upon petitioner's application for writ of habeas corpus; and

It appearing to the Court that petitioner alleges he is being unlawfully held in State custody for the following reasons:

1. That petitioner received a greater sentence upon his appeal of a General County Court conviction to the Superior Court.

2. That petitioner was denied his right to be present at his State post-conviction hearing.

In support of his allegations, petitioner asserts that he was arrested on July 2, 1968 on the charge of driving under the influence of alcohol; that he was tried in the General County Court of Buncombe County, North Carolina, on July 14, 1968, at which time he entered a plea of not guilty; that he was found guilty and received a sentence of nine (9) months to be suspended upon payment of a fine of $100 and the costs. Petitioner further asserts that he appealed to the Superior Court of Buncombe County and that on August 2, 1968 he was tried and found guilty by a jury in said Court and that he then received a sentence of two (2) years which he is presently serving. Petitioner further asserts that he was not allowed to be present when his court-appointed counsel presented his case at the State post-conviction hearing.

The petitioner further asserts that after being denied relief at the State post-conviction hearing, he gave notice of appeal but on November 22, 1966 withdrew the same and has not filed a petition for certiorari to the North Carolina Court of Appeals. The Court is of the opinion that inasmuch as all the remedies available in the State Courts have apparently not been exhausted, the doctrine of exhaustion of state remedies requires that this Court not grant the relief requested. Petitioner has not exhausted his State remedies so as to be entitled to seek federal habeas corpus relief. *Ganger v. Peyton*, 379 F. 2d 709 (4th cir. 1967); *Brown v. State of North Carolina*, 341 F. 2d 87 (4th Cir. 1965); *Key v. Holman*, 346 F. 2d 153 (5th Cir. 1965); *Wampler v. Warden*, 224 F. Supp. 37 (1963).

Petitioner has duly filed an application to proceed in forma pauperis and same is hereby allowed.

AND it appearing that petitioner has asserted no claim upon which relief can be granted,

IT IS, THEREFORE, ORDERD that the application for writ of habeas corpus be, and the same is hereby dismissed, and the Clerk is directed to mail a copy of this Memorandum and Order to the petitioner and to the Attorney General of North Carolina.

This, the 23rd day of December, 1968.

Woodrow W. Jones
Chief Judge,
United States District Court

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 13,074

Thurman E. Wood,

Appellant,

v.

Maj. Fred Ross, Supt. of
Caledonia Prison Farm,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jr., District Judge.

No. 13,425

Wayne Claude Rice,

Appellant,

v.

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones, District Judge.

(Argued May 8, 1970 Decided November 16, 1970.)

Before Bryan and Craven, Circuit Judges, and Russell, District Judge.

William W. Van Alstyne (Court-assigned counsel) for Appellants, and Edward L. Eatmen, Jr., Staff Attorney, Office of the Attorney General of North Carolina, (Robert Morgan, Attorney General of North Carolina, and Jacob L. Safron, Staff Attorney, Office of the Attorney General of North Carolina, on brief) for Appellee.

Albert V. Bryan, Circuit Judge:

These are common appeals in habeas corpus aimed at the *ultimate* convictions in North Carolina record courts of Wayne Claude Rice and Thurman E. Wood. They assert that in the review allowed them by the State from their *primary* convictions in courts not of record, each experienced unconstitutional overreaching by the State. Both claim they were denied due process, in that they were given harsher punishments on the appeals than in their initial trials. Additionally, Wood argues that he was put in double jeopardy. In our judgment appellants should prevail.

THE WOOD CASE

Wood pleaded guilty, July 19, 1962, and was given the maximum sentence of two years, in the Recorder's Court of the City of Dunn, North Carolina on a *misdemeanor* charge of breaking and entering *without* intent to commit a felony. N. C. Gen. Stat. 14-54. Wood appealed to the Superior Court as permitted by the organic statutes which also provide for a de novo trial. GS 7-230 and 15-177.1.

At the term commencing in August, 1962, Wood was indicted for the same act by a grand jury, but this time for a *felony*—namely the offense of breaking and entering *with* criminal intent. GS 14-54. Again he pleaded guilty but this time he was

ordered to serve 10 years imprisonment, with five years suspended on probationary conditions. GS 14-2. On October 15, 1965, this grace was forfeited, but on March 15, 1966 the Governor of North Carolina commuted the sentence to five years.

For relief, post-conviction remedies and habeas corpus were pursued in the Superior and Supreme Court of North Carolina on the contention that the due process clause of the Fourteenth Amendment forbids the augmenting of punishment on appeal beyond the penalty imposed at the first trial, citing Patton v. North Carolina, 381 F2d 636, 638-41 (4 Cir. 1967), cert. denied 390 US 905 (1968). Failing in the State tribunals, Wood petitioned the Federal District Court of Eastern North Carolina for release on habeas corpus. In replication, the State contended that *Patton* was distinguishable on the premise that there the appeal was simply a continuation of the first case, while here the second proceeding was a new and different cause.

The District Court refused relief October 17, 1968 and this order is the predicate of the instant appeal. Stout precedent for its view is found in State v. Morris, 275 NC 50, 165 SE2d 245, 252 (1969) and State v. Tolley, 271 NC 459, 156 SE2d 858, 860 (1967). These declare that since in North Carolina the appeal from the inferior to the higher court is de novo, the latter was at liberty to punish to the limit of the statute, unrestricted by the first judgment.

Notwithstanding the force of the decisional law adopted by the District Court, we cannot accept its conclusion that there was no violation of due process in the imposition here of a harsher sentence when the accused exercised his legal right to appeal. The review is a privilege granted by the State and cannot, compatibly with due process, be encumbered.

Our position was first and fundamentally stated in *Patton*, supra, 381 F2d at 638-41. Its logic is not dislodged by terming the second trial here as a totally independent and discrete proceeding. In both trials the misconduct to be punished was

identical. The penalty cannot be expanded merely because of redetermination of guilt.

While North Carolina v. Pearce, 395 US 711 (1969) had not come down at the time of the District Court's decision, its reasoning is now available.[1] There the Court accepted the due process rationale of *Patton*. Nevertheless, the Court modified the *Patton* doctrine that in no event could a sentence be increased on appeal. Instead, the Court concluded that a more stringent sentence on the second trial constitutes withdrawal of Federal due process when there is no proof of intervening detrimental deportment. Id. at 723-26.

The present lack of such proof compels the conclusion that Wood suffered a denial of due process. He was exercising the only avenue afforded to review his conviction. Like the defendants in *Pearce*, Wood had the right to appeal free of the fear of reprisal on the part of the sentencing judge. Id. at 725. No distinction can be drawn between the appellant's right in the two cases.

Wood's appeal irrevocably erased his conviction in the lower court. "'. . . [W]hen appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and *is not thereafter available for any purpose.*' (Emphasis added.) State v. Goff, 205 N.C. 545, 172 S.E. 407." State v. Anderson, 5 NC App. 614, 169 SE2d 38, 39-40 (1969). Hence, Wood could be tried solely on the appeal, but only then with assurance of no enhancement of punishment in the event of another conviction without proof of supervening misconduct. This assurance was violated by the State and so his conviction on appeal as well as his first conviction falls.

Our holding that the State cannot with due process punish

---

1. Notably, after oral argument in this case, the Supreme Court of North Carolina held that *Pearce* does not apply to de novo trials resulting from appeals of convictions entered in non-record courts. See State v. Spencer, ____NC____, 173 SE2d 765, 772 (May 13, 1970); State v. Sparrow, ____NC ____, 173 SE2d 897, 903 (May 13, 1970).

Wood on appeal more heavily than he was originally charged, discloses too that he suffered double jeopardy. This is because the charge against him was increased after he had been tried for an offense consisting of an essential element of the greater offense. That is to say, he had been tried for breaking and entering, and then the State tried him for a felony in which breaking and entering was an indispensable element. Cf. Waller v. Florida, 397 US 387 (1970).

The Fifth Amendment, of course, provides "nor shall any person be subject for the *same offense* to be twice put in jeopardy of life or limb", (Accent added.) This prohibition applies to the States. Benton v. Maryland, 395 US 784 (1969). Thus, again, the conviction of Wood is seen to be vitiated. Cf. Price v. Georgia, 398 US 323 (1970); Green v. United States, 355 US 184 (1957); Grafton v. United States, 206 US 333, 350 (1907); Dove v. Peyton, 343 F2d 210, 214 (4 Cir. 1965); Ekberg v. United States, 167 F2d 380, 386 (1 Cir. 1948).

Finally, we note that Wood was released on June 23, 1970 as having completed the five-year sentence. Habeas corpus is thus no longer needed to relieve his detention. Nevertheless, his claims for relief are not mooted. Sibron v. New York, 392 US 40, 55 (1968). He is entitled to a declaration that his convictions were of no effect and preclude consequences which might otherwise result. Hewett v. North Carolina, 415 F2d 1316, 1321-22 (4 Cir. 1969).

Accordingly, we direct issuance of the writ with complete cancellation of the record of his convictions, for the State defeated his right of appeal and it cannot now justly recapture or retry him.

THE RICE CASE

Rice was arrested on July 2, 1968 for driving while intoxicated on a North Carolina State highway. GS 20-138. After trial in the General County Court of Buncombe County on July 19, 1968 upon a plea of not guilty, Rice was convicted and sen-

tenced to imprisonment for nine months, with suspension of execution upon the payment of a fine of $100.00 and costs. On appeal to the Superior Court of the County, he was found guilty and commited to two years imprisonment.

State post-conviction steps failed. He appealed to the North Carolina Court of Appeals, but withdrew his petition and applied to the Federal District Court for Western North Carolina to be discharged on habeas corpus. The argument advanced by Rice there was that the State statute conferred upon him the right of appeal, and that enlargement of the punishment clearly ignored the Federal due process announced in our decision in Patton v. North Carolina, supra, 381 F2d 636.

The District Judge denied the application for habeas corpus on December 23, 1968, for Rice's failure to exhaust his State remedies. The omission was the appeal to the State Court of Appeals. The ruling of the District Court refusing the writ is the subject of this appeal.

We think the District Court was in error in dismissing for Rice's failure to complete the remedies available to him in the State court. It would have been futile. Concededly the Supreme Court of North Carolina had consistently refused to follow *Patton*. State v. Morris, 275 NC 50, 165 SE2d 245 (1969); State v. Stafford, 274 NC 519, 164 SE2d 371 (1968); State v. Tolley, 271 NC 459, 156 SE2d 858 (1967). In these circumstances, exhaustion of State remedies is not indispensable. Hayes v. Boslow, 336 F2d 31, 32 (4 Cir. 1964); cf. Wright v. Maryland Penitentiary, ... F2d ..... (4 Cir. June 23, 1970).

On the merits, we reach the same conclusion as we did in Wood's appeal. While the District Judge went no further than to dismiss the appeal for non-pursuit of State remedies, the grounds for relief still asserted by Rice parallel those of Wood. As in *Wood*, the record reveals nothing which warrants the increased punishment. On the strength of *Pearce*, we again see

the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.

The upshot is that for the reasons stated in *Wood*, except the double jeopardy ground, Rice is not to be held to his conviction. He was completely discharged by North Carolina on January 24, 1970 but this did not moot the case on habeas corpus. Injurious consequences because of the convictions might still obtain. We think Rice is entitled to expunction of the record of them.

In today's decisions, the court is not insensitive to the logical and persuasive argument to the contrary in Lemieux v. Robbins, 414 F2d 353 (1 Cir. 1969), cert. denied 397 US 1017 (1970). Likewise we expresse deference to the opinion in Evans v. City of Richmond, 210 Va. 403, 171 SE2d 247 (1969). We simply disagree.

Reversed with directions.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C.G.S. § 7-195. *Appeal to superior court.*—Any person convicted of any offense of which the recorder has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the recorder, in the same manner as is now provided for appeals from courts of justices of the peace. Upon such appeal the defendant shall be required to give bond or recognizance with sufficient surety for his appearance at the next term of the superior court; and in default thereof the recorder shall commit him to the county jail of the county until he shall give bond or be otherwise discharged by law. (1919, c. 277, ss. 5, 9).

N.C.G.S. § 7A-290. *Appeal from district court in criminal cases; notice; appeal bond.*—Any defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon receiving notice of appeal, the clerk shall transfer the case to the district or superior court criminal docket. Appeal bond may be set by the judge in his discretion.

N.C.G.S. § 15-177. *Appeal from justice, trial de novo.*—The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as afore-

said. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings. (1868-9, c. 178, subc. 4, s. 11.)

N.C.G.S. § 15-177.1. *Appeal from justice of the peace or inferior court; trial anew or de novo.*—In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon. (1947, c. 482.)

N.C.G.S. § 20-179. *Penalty for driving while under the influence of intoxicating liquor or narcotic drugs.*—Every person who is convicted of violating § 20-138, relating to habitual users of narcotic drugs or driving while under the influence of intoxicating liquor or narcotic drugs, shall, for the first offense, be punished by a fine of not less than one hundred dollars ($100.00) or imprisonment for not less than thirty (30) days, or by both such fine and imprisonment, in the discretion of the court. For a second conviction of the same offense, the defendant shall be punished by a fine of not less than two hundred dollars ($200.00) or imprisonment for not less than six months, or by both such fine and imprisonment, in the discretion of the court. For a third or subsequent conviction of the same offense, the defendant shall be punished by a fine of not less than five hundred dollars ($500.00) or by both such fine and imprisonment in the discretion of the court not to exceed two years. (1937, c. 407, s.)

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STATE OF NORTH CAROLINA,

Petitioner

v.

WAYNE CLAUDE RICE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

ROBERT MORGAN
Attorney General of North Carolina

JACOB L. SAFRON
Assistant Attorney General

Post Office Box 629
Raleigh, N. C. 27602

COUNSEL FOR PETITIONER

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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No.

STATE OF NORTH CAROLINA,

Petitioner

v.

WAYNE CLAUDE RICE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, the State of North Carolina, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in the case of WAYNE CLAUDE RICE v. STATE OF NORTH CAROLINA filed November 16, 1970.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit filed November 16, 1970, is not yet reported and is printed as Appendix A to this Petition (A pp 10-16).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

DOES THE IMPOSITION OF A GREATER SENTENCE UPON JURY TRIAL AND CONVICTION WHEN THE ACCUSED EXERCISED HIS UNFETTERED AND ABSOLUTE RIGHT TO A TRIAL DE NOVO BEFORE A JURY IN THE SUPERIOR COURT UPON "APPEAL" FROM THE STATE DISTRICT COURT, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Wayne Claude Rice was arrested on July 2, 1968, on a charge of driving under the influence of alcohol. He was tried in the General County Court of Buncombe County, North Carolina, on July 19, 1968, at which time he entered a plea of not guilty. He was found guilty and sentenced to a term of nine months imprisonment which was suspended upon payment of a fine of $100.00 and costs. Thereupon, Rice "appealed" the County Court Judgment to the Superior Court of Buncombe County for trial *de novo* pursuant to North Carolina General Statutes §§ 15-177 and 15-177.1, which is now provided for in North Carolina General Statute 7A-290 under North Carolina's new District Court system:

> "In all cases of appeal to the Superior Court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and *de novo* by a jury, without prejudice from the former proceedings

of the court below, irrespective of the plea entered or the judgment pronounced thereon." N.C.G.S. 15-177.1.

"Any defendant convicted in a District Court before the magistrate may appeal to the District Court for a trial *de novo* before the District Court Judge. Any defendant convicted in a District Court before the Judge may appeal to the Superior Court for trial *de novo*. . . ." N.C.G.S. 7A-290.

On August 2, 1968, Rice was tried before a jury in the Buncombe County Superior Court, found guilty of driving under the influence of alcohol and sentenced to a term of two years. He did not appeal the conviction and sentence. However, he thereafter filed a Petition for post conviction review in the Buncombe County Superior Court under the provisions of the North Carolina Post Conviction Hearing Act, N.C.G.S. 15-217, et seq. From an Order entered October 30, 1968, denying post conviction relief, Rice filed a Notice of Appeal to the North Carolina Court of Appeals. On November 22, 1968, he withdrew that appeal, and did not file a Petition for Writ of Certiorari to the North Carolina Court of Appeals, N.C.G.S. 15-222, until after the decision of the Federal District Court, *infra*. On December 11, 1968, Rice filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of North Carolina which was denied on December 23, 1968, by Chief Judge Woodrow W. Jones upon the ground that Rice had failed to exhaust his available State remedies. Upon Rice's appeal to the United States Court of *Appeals for the Fourth Circuit*, it was held that ". . . the District Court was in error in dismissing for Rice's failure to complete the remedies available to him in the State court. It would have been futile . . .", and stated "on the strength of PEARCE (NORTH CAROLINA v. PEARCE, 395 U. S. 711 (1969)), we again see the more drastic sentence on the second trial as a denial of Federal due process . . ." The Court concluded its opinion by stating that ". . . the court is not insensi-

tive to the logical and persuasive argument to the contrary in LEMIEUX v. ROBBINS, 414 F. 2d 353 (1 Cir. 1969), cert. dnd. 397 U. S. 1017 (1970). Likewise we express deference to the opinion in EVANS v. CITY OF RICHMOND, 210 Va. 403, 171 S.E. 2d 247 (1969). *We simply disagree.*" (Emphasis added.) Concluding that the sentence imposed upon Rice by the Judge of the Superior Court was a denial of Federal due process, the Fourth Circuit Court of Appeals directed that ". . . Rice is not to be held to his conviction. He was completely discharged by North Carolina on January 24, 1970, but this did not moot the case on habeas corpus. Injurious consequences because of the conviction might still obtain. *We think Rice is entitled to expunction of the record of them.*" (Emphasis added.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN RICE v. NORTH CAROLINA CONFLICTS WITH THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IN LEMIEUX v. ROBBINS, 414 F. 2d 353 (1 Cir. 1969), cert. dnd. 397 U. S. 1017 (1970).

In reliance upon what it conceived to be the principles established in NORTH CAROLINA v. PEARCE, 395 U. S. 711 (1969), the Fourth Circuit has here held that the imposition of a greater sentence upon the exercise of the unfettered right of trial *de novo* is a denial of Federal due process. The decision of the Fourth Circuit Court of Appeals in RICE is in conflict with the decision of the First Circuit Court of Appeals in LEMIEUX v. ROBBINS, *supra*. In deciding RICE, the Fourth Circuit stated "we simply disagree" with the holding of the First Circuit in LEMIEUX, with which it is in direct conflict. While acknowledging the "logical and persuasive argument to the contrary in LEMIEUX", the Fourth Circuit declined to follow the First Circuit's reasoning. The Fourth Circuit also disagreed with the opinion of the Supreme Court of Virginia in EVANS v. CITY OF RICH-

MOND, 210 Va. 403, 171 S.E. 2d 247 (1969). In concluding that PEARCE was applicable, the Fourth Circuit also disagreed with the Supreme Court of North Carolina. STATE v. SPENCER, 276 N.C. 535, 173 S.E. 765 (1970); STATE v. SPARROW, 276 N.C. 499, 173 S.E. 2d 897 (1970). See n. 1. (A p 13). The Fourth Circuit also failed to cite the decision of the Supreme Court of Michigan to the contrary. MICHIGAN v. OLARY, 382 Mich. 559, 170 N.W. 2d 842 (1969). Moreover, the Supreme Court of Maine in LEMIEUX v. MAINE, 240 A. 2d 202 (Me. 1968) and the Supreme Court of Nebraska in STATE v. STANOSHECK, 186 Neb. 17, 180 N.W. 2d 226 (1970), are also contrary to the position taken by the Fourth Circuit in RICE.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW RAISES SERIOUS PROBLEMS AFFECTING THE STRUCTURE OF CRIMINAL JUSTICE IN A SIGNIFICANT NUMBER OF JURISDICTIONS.

The decision below should be reviewed because it erroneously applies the holding of NORTH CAROLINA v. PEARCE, *supra*, to a situation not intended by this Court. In PEARCE, the Appellant was tried and sentenced in a State Superior Court. His conviction was reversed on appeal after a successful attack on constitutional grounds and he was retried in the same Superior Court. Thus, he was clearly retried in a second court of record and of equal dignity with the court which held his first trial. The language of this Court in PEARCE implies that the principle enunciated should be limited to the facts of that case. The problem before this Court concerned "the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon *retrial*." 395 U.S. at 716. Or, as otherwise stated, "what constitutional limitations there may be upon the general power of a judge to impose *upon reconviction* a longer prison sentence than the

defendant originally received." 395 U.S. at 719. The Court also refers to "a man who is *retried after his first conviction has been set aside . . .*" 395 U.S. at 722. RICE was not required to attack his conviction or sentence in the General County Court (now District Court), or seek a reversal since trial *de novo* in the Superior Court is an absolute right even when the defendant pleads guilty in the lower court. N.C.G.S. 15-177.1; N.C.G.S. 7A-290.

The type of case to which the PEARCE holding applies is obviously one which began in the Superior Court, was appealed to an appellate court, and a new trial awarded *on a point of law*. The reversal and remand for a new trial usually involves an overruling of a trial judge on a point of law. In the present case, the "appeal" to the Superior Court for trial *de novo* is a matter of right and does not involve an overruling of a trial judge on a point of law. It must also be pointed out that the inferior court is not a court of record. Therefore the Petitioner submits that the case at bar does not fall under the dictates of the PEARCE case.

North Carolina District Courts do not provide for jury trials and transcripts are not available in criminal cases. They are not courts of record. The Superior Court in North Carolina tries the defendant *de novo* from the beginning to the end on both the law and the facts, without regard to the plea, trial, verdict, or judgment in the inferior court. When an appeal of right is taken to the Superior Court, the case is, in the eyes of the State, ". . . originally brought therein, . . . upon questions of law and fact, the judgment appealed from is completely annulled and is not thereafter available for any purpose." STATE v. GOFF, 205 N.C. 545, 172 S.E. 407 (1934); STATE v. ANDERSON, 5 N.C. App. 614, 615, 196 S.E. 2d 38 (1969).

The system of dual levels of court in which the defendant charged with a less serious offense is initially tried in an inferior court before a judge (in North Carolina this includes traffic offenses, disorderly persons violations and misdemeanors), is

also in effect in at least twenty-three other states, and possibly more than presently revealed in our research.[1] If the Fourth Circuit's opinion in RICE stands, North Carolina, together with Arizona, Arkansas, Colorado, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraka, Nevada, New Hampshire, New Mexico, North Dakota, Texas, Utah, Virginia and Washington, will all be required to completely revise their judicial systems. It holds the promise of converting lower criminal trial courts, which now handle the vast number of misdemeanor and other offenses within their jurisdiction and alleviate court congestion by determining cases which do not require jury trials,[2] into mere stepping stones to superior courts

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1. ARIZONA—A.R.S. § 22-374; ARKANSAS—Ark. Stat. §§ 44-501, 502 and 509; COLORADO—Rule 37(f) Colo. Rules of Crim. Pro.; FLORIDA—Constitution of Florida, Art. V, §§ 11(2) and 6(3). See also F.S.A. §§§ 932.53, 54, 55 and 56; INDIANA—Burns' Ind. Stat. Ann. § 9-721. See also PEELE v. STATE, 161 Ind. 378, 68 N.E. 682, and HARLAN v. STATE, 190 Ind. 332, 130 N.E. 413; KANSAS—K.S.A. § 22-3610. See also STATE v. COULTER, 40 Kan. 87, 19 P. 368 (1888), and STATE v. FORNER, 32 Kan. 281, 4 P. 357 (1884); KENTUCKY—K.R.S. § 23.032 and Rule 12.06 Ky. Rules of Crim. Pro. See also DRESSMAN v. COMMONWEALTH, 204 Ky. 668, 265 S.W. 3 (1924); MAINE—Me. Rules of Crim. Pro., Dist. Ct. Rules 37(a) and 39(a), (b) and (c). See also LEMIEUX v. MAINE, 240 A. 2d 206 (Me. 1968) and LEMIEUX v. ROBBINS, 414 F. 2d 353 (1st Cir. 1969), cert. dnd. 397 U.S. 1017 (1970); MARYLAND—Baltimore City Municipal Code (Art. 5 § 43, Ann. Code of Md., Vol. I, 1968 Replacement Vol.) and Art. 52 § 13(b), Ann. Code of Md., Vol. 5, 1968 Replacement Vol. See also Art. 26 § 156, Ann. Code of Md. Vol. 2. 1966 Replacement Vol., 1970 Cumm. Supp.; MICHIGAN—PEOPLE v. OLARY, 382 Mich. 559, 170 N.W. 2d 842 (1969); MINNESOTA—M.S.A. § 488.20 and §§§ 633.20, 21 and 22; MISSISSIPPI—Miss. Code §§ 1201 and 1202; MISSOURI—Supreme Court Rule '22 §§ 10 and 11; MONTANA—R.C.M. § 95-2009. See also WHITE SULPHUR SPRINGS v. VOISE, 136 Mont. 1, 343 P. 2d 855 (1959); NEVADA—Rule 76 Justices' Court Pro.; NEW HAMPSHIRE—STATE v. DESPRES, 107 N.H. 297, 220 A. 2d 758 (1966). See also N.H.R.S.A. §§§ 502.18, 502A:11 and 12, and 599:1; NEW MEXICO—N.M.S.A. § 36-15-3(A); NORTH DAKOTA—N.D. Cent. Code §§ 33-12-40 and 41; TEXAS—Vernon's Ann. Code of Crim. Pro. §§ 44.17 and 45.10; UTAH—Utah Code Ann. §§ 78-4-17 and 78-5-14. See also Utah Code Ann. §§ 77-57-43 and 77-27-2; VIRGINIA—Va. Code § 16.1-136. See also EVANS v. CITY OF RICHMOND, 210 Va. 403, 171 S.E. 2d 247 (1969); WASHINGTON—R.C.W. §§ 3.50.280 and 3.50.410. See also STATE v. HAGIMORI, 57 Wash. 623, 107 P. 855 (1910).

2. For example, according to data supplied by the Administrative Office of the Courts for the State of North Carolina*, for the 1969 calendar year, the last year for which complete information is available, the Superior Courts of 83 of the 100 counties of this State tried 25,840 criminal cases, of which 15,765 were trials *de novo* from the District Courts. In other words, 61.0% of all criminal trials in the Superior Courts of North Carolina were upon trial *de novo*.

for criminal defendants charged with misdemeanor and other inferior offenses. These defendants will have everything to gain and nothing to lose as they congest already crowded superior court criminal calendars and frustrate all efforts to implement the constitutional mandate of speedy trial in the criminal trial courts.

CONCLUSION

The decision of the Fourth Circuit in the application of the PEARCE doctrine in this case extends well beyond the intent of this Court. It is clear that this Court's holding in PEARCE did not envision the factual situation of the case at bar. The case at bar is governed by a statutory procedure and is not the type of "new trial" to which the holding in PEARCE applies. Therefore, in view of the conflict of decisions between the First Circuit Court of Appeals in LEMIEUX v. ROBBINS, and the Fourth Circuit Court of Appeals in RICE v. NORTH CAROLINA, the decisions of the highest courts of many of the states, and the effect upon the administration of criminal justice in at least twenty-three states, it is respect-

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During 1969, the District Courts of the 83 counties in which the new District Court system had already been implemented, tried 334,747 cases, of which 15,765 were "appealed" for trial *de novo* in the Superior Court. (The figure of 334,747 includes only cases which were actually tried; and excludes cases disposed of by waiver, preliminary hearing, nol pros or otherwise.) Of the cases tried in the District Courts, 4.71% were "appealed" to the Superior Court for trial *de novo*.

Using the 1969 statistics as an indicator, it is possible to project the impact upon the Superior Court of any increase in the number of cases "appealed" from the District Courts for trial *de novo*. An increase of one percent in the number of cases "appealed" from the District Courts would add 3,348 cases to the Superior Court criminal docket. An addition of 3,348 cases constitutes an increase of 13 percent in the Superior Court docket. The ratio between an increase in cases "appealed" from the District Court and the consequent increase in the Superior Court criminal docket is one to thirteen. *If cases "appealed" from the District Court increased by five percent, the caseload of the Superior Court would increase by 65 percent; if the cases "appealed" from the District Court increased by 10 percent, the caseload of the Superior Court would increase by 130 percent.*

* This data is taken from the Annual Report of the Administrative Office of the Courts, 1969, and from reports submitted to the Administrative Office by the Clerks of Superior Court. These statistics relate to the 1969 calendar year and cover only the 83 counties of the State then under the District Court system. On December 7, 1970, the remaining 17 of the State's 100 counties came under the new District Court system.

fully submitted that this case is of sufficient importance that this Court exercise its jurisdiction and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ROBERT MORGAN
Attorney General

JACOB L. SAFRON
Assistant Attorney General

Post Office Box 629
Raleigh, N. C. 27602

COUNSEL FOR PETITIONER

Appendix A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 13,074

Thurman E. Wood,

Appellant,

v.

Maj. Fred Ross, Supt. of
Caledonia Prison Farm,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jr., District Judge.

No. 13,425

Wayne Claude Rice,

Appellant,

v.

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones, District Judge.

(Argued May 8, 1970 Decided November 16, 1970.)

Before Bryan and Craven, Circuit Judges, and Russell, District Judge.

William W. Van Alstyne (Court-assigned counsel) for Appellants, and Edward L. Eatmen, Jr., Staff Attorney, Office of the Attorney General of North Carolina, (Robert Morgan, Attorney General of North Carolina, and Jacob L. Safron, Staff Attorney, Office of the Attorney General of North Carolina, on brief) for Appellee.

Albert V. Bryan, Circuit Judge:

These are common appeals in habeas corpus aimed at the *ultimate* convictions in North Carolina record courts of Wayne Claude Rice and Thurman E. Wood. They assert that in the review allowed them by the State from their *primary* convictions in courts not of record, each experienced unconstitutional overreaching by the State. Both claim they were denied due process, in that they were given harsher punishments on the appeals than in their initial trials. Additionally, Wood argues that he was put in double jeopardy. In our judgment appellants should prevail.

THE WOOD CASE

Wood pleaded guilty, July 19, 1962, and was given the maximum sentence of two years, in the Recorder's Court of the City of Dunn, North Carolina on a *misdemeanor* charge of breaking and entering *without* intent to commit a felony. N. C. Gen. Stat. 14-54. Wood appealed to the Superior Court as permitted by the organic statutes which also provide for a de novo trial. GS 7-230 and 15-177.1.

At the term commencing in August, 1962, Wood was indicted for the same act by a grand jury, but this time for a *felony*—namely the offense of breaking and entering *with* criminal intent. GS 14-54. Again he pleaded guilty but this time he was

ordered to serve 10 years imprisonment, with five years suspended on probationary conditions. GS 14-2. On October 15, 1965, this grace was forfeited, but on March 15, 1966 the Governor of North Carolina commuted the sentence to five years.

For relief, post-conviction remedies and habeas corpus were pursued in the Superior and Supreme Court of North Carolina on the contention that the due process clause of the Fourteenth Amendment forbids the augmenting of punishment on appeal beyond the penalty imposed at the first trial, citing Patton v. North Carolina, 381 F2d 636, 638-41 (4 Cir. 1967), cert. denied 390 US 905 (1968). Failing in the State tribunals, Wood petitioned the Federal District Court of Eastern North Carolina for release on habeas corpus. In replication, the State contended that *Patton* was distinguishable on the premise that there the appeal was simply a continuation of the first case, while here the second proceeding was a new and different cause.

The District Court refused relief October 17, 1968 and this order is the predicate of the instant appeal. Stout precedent for its view is found in State v. Morris, 275 NC 50, 165 SE2d 245, 252 (1969) and State v. Tolley, 271 NC 459, 156 SE2d 858, 860 (1967). These declare that since in North Carolina the appeal from the inferior to the higher court is de novo, the latter was at liberty to punish to the limit of the statute, unrestricted by the first judgment.

Notwithstanding the force of the decisional law adopted by the District Court, we cannot accept its conclusion that there was no violation of due process in the imposition here of a harsher sentence when the accused exercised his legal right to appeal. The review is a privilege granted by the State and cannot, compatibly with due process, be encumbered.

Our position was first and fundamentally stated in *Patton*, supra, 381 F2d at 638-41. Its logic is not dislodged by terming the second trial here as a totally independent and discrete proceeding. In both trials the misconduct to be punished was

identical. The penalty cannot be expanded merely because of redetermination of guilt.

While North Carolina v. Pearce, 395 US 711 (1969) had not come down at the time of the District Court's decision, its reasoning is now available.[1] There the Court accepted the due process rationale of *Patton*. Nevertheless, the Court modified the *Patton* doctrine that in no event could a sentence be increased on appeal. Instead, the Court concluded that a more stringent sentence on the second trial constitutes withdrawal of Federal due process when there is no proof of intervening detrimental deportment. Id. at 723-26.

The present lack of such proof compels the conclusion that Wood suffered a denial of due process. He was exercising the only avenue afforded to review his conviction. Like the defendants in *Pearce*, Wood had the right to appeal free of the fear of reprisal on the part of the sentencing judge. Id. at 725. No distinction can be drawn between the appellant's right in the two cases.

Wood's appeal irrevocably erased his conviction in the lower court. "'. . . [W]hen appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and *is not thereafter available for any purpose.*' (Emphasis added.) State v. Goff, 205 N.C. 545, 172 S.E. 407." State v. Anderson, 5 NC App. 614, 169 SE2d 38, 39-40 (1969). Hence, Wood could be tried solely on the appeal, but only then with assurance of no enhancement of punishment in the event of another conviction without proof of supervening misconduct. This assurance was violated by the State and so his conviction on appeal as well as his first conviction falls.

Our holding that the State cannot with due process punish

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1. Notably, after oral argument in this case, the Supreme Court of North Carolina held that *Pearce* does not apply to de novo trials resulting from appeals of convictions entered in non-record courts. See State v. Spencer, ____NC____, 173 SE2d 765, 772 (May 13, 1970); State v. Sparrow, ____NC ____, 173 SE2d 897, 903 (May 13, 1970).

Wood on appeal more heavily than he was originally charged, discloses too that he suffered double jeopardy. This is because the charge against him was increased after he had been tried for an offense consisting of an essential element of the greater offense. That is to say, he had been tried for breaking and entering, and then the State tried him for a felony in which breaking and entering was an indispensable element. Cf. Waller v. Florida, 397 US 387 (1970).

The Fifth Amendment, of course, provides "nor shall any person be subject for the *same offense* to be twice put in jeopardy of life or limb". (Accent added.) This prohibition applies to the States. Benton v. Maryland, 395 US 784 (1969). Thus, again, the conviction of Wood is seen to be vitiated. Cf. Price v. Georgia, 398 US 323 (1970); Green v. United States, 355 US 184 (1957); Grafton v. United States, 206 US 333, 350 (1907); Dove v. Peyton, 343 F2d 210, 214 (4 Cir. 1965); Ekberg v. United States, 167 F2d 380, 386 (1 Cir. 1948).

Finally, we note that Wood was released on June 23, 1970 as having completed the five-year sentence. Habeas corpus is thus no longer needed to relieve his detention. Nevertheless, his claims for relief are not mooted. Sibron v. New York, 392 US 40, 55 (1968). He is entitled to a declaration that his convictions were of no effect and preclude consequences which might otherwise result. Hewett v. North Carolina, 415 F2d 1316, 1321-22 (4 Cir. 1969).

Accordingly, we direct issuance of the writ with complete cancellation of the record of his convictions, for the State defeated his right of appeal and it cannot now justly recapture or retry him.

THE RICE CASE

Rice was arrested on July 2, 1968 for driving while intoxicated on a North Carolina State highway. GS 20-138. After trial in the General County Court of Buncombe County on July 19, 1968 upon a plea of not guilty, Rice was convicted and sen-

tenced to imprisonment for nine months, with suspension of execution upon the payment of a fine of $100.00 and costs. On appeal to the Superior Court of the County, he was found guilty and commited to two years imprisonment.

State post-conviction steps failed. He appealed to the North Carolina Court of Appeals, but withdrew his petition and applied to the Federal District Court for Western North Carolina to be discharged on habeas corpus. The argument advanced by Rice there was that the State statute conferred upon him the right of appeal, and that enlargement of the punishment clearly ignored the Federal due process announced in our decision in Patton v. North Carolina, supra, 381 F2d 636.

The District Judge denied the application for habeas corpus on December 23, 1968, for Rice's failure to exhaust his State remedies. The omission was the appeal to the State Court of Appeals. The ruling of the District Court refusing the writ is the subject of this appeal.

We think the District Court was in error in dismissing for Rice's failure to complete the remedies available to him in the State court. It would have been futile. Concededly the Supreme Court of North Carolina had consistently refused to follow *Patton*. State v. Morris, 275 NC 50, 165 SE2d 245 (1969); State v. Stafford, 274 NC 519, 164 SE2d 371 (1968); State v. Tolley, 271 NC 459, 156 SE2d 858 (1967). In these circumstances, exhaustion of State remedies is not indispensable. Hayes v. Boslow, 336 F2d 31, 32 (4 Cir. 1964); cf. Wright v. Maryland Penitentiary, ... F2d ..... (4 Cir. June 23, 1970).

On the merits, we reach the same conclusion as we did in Wood's appeal. While the District Judge went no further than to dismiss the appeal for non-pursuit of State remedies, the grounds for relief still asserted by Rice parallel those of Wood. As in *Wood*, the record reveals nothing which warrants the increased punishment. On the strength of *Pearce*, we again see

the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.

The upshot is that for the reasons stated in *Wood*, except the double jeopardy ground, Rice is not to be held to his conviction. He was completely discharged by North Carolina on January 24, 1970 but this did not moot the case on habeas corpus. Injurious consequences because of the convictions might still obtain. We think Rice is entitled to expunction of the record of them.

In today's decisions, the court is not insensitive to the logical and persuasive argument to the contrary in Lemieux *v.* Robbins, 414 F2d 353 (1 Cir. 1969), cert. denied 397 US 1017 (1970). Likewise we expresse deference to the opinion in Evans v. City of Richmond, 210 Va. 403, 171 SE2d 247 (1969). We simply disagree.

Reversed with directions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1925~~ 70-77

NORTH CAROLINA,

Petitioner

—v.—

WAYNE RICE,

Respondent

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM W. VAN ALSTYNE
Counsel Assigned by the
Court of Appeals
Duke University Law School
Durham, North Carolina 27706

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IN THE

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WAYNE RICE,

Respondent

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit (App. A of Petition) is reported at 434 F.2d 297 (1970).

Jurisdiction

Jurisdictional requirements arising under 28 U.S.C. § 1254 (1) are satisfied in that review of this civil case is sought on petition of one of the parties for a writ of certiorari after rendition of judgment by the court of appeals, insofar as 28 U.S.C. § 1254 (1) authorizes that such a case "may be reviewed" by this Court should the Court otherwise conclude that issuance of the writ is appropriate under the circumstances.

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Question Presented

Was the Court of Appeals correct in holding that a State denies due process of law when it more harshly sentences a defendant following retrial for the same offense from which he appealed for a trial de novo and when:

a) The defendant "was exercising the *only* avenue afforded to review his conviction," (434 F.2d at 299) (emphasis added);

b) After recourse to this sole avenue of review and retrial for the same offense, the defendant received an active sentence more than twice as severe as that imposed upon him at the conclusion of the original trial;

c) This doubly harsher sentence at the conclusion of the second trial was imposed by the court itself and not by the jury;

d) No reason whatever appears in explanation of this severely harsher sentence "so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal," (*North Carolina v. Pearce*, 395 U.S. 711, 726 [1969]); and

e) There is consequently no way at all for any other court to determine whether the harsher sentence is in fact based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding," rather than upon "vindictiveness against a defendant for having successfully attacked his first conviction." *Id.* at 725, 726.

More succinctly, the question Petitioner would have this Court review is whether the Court of Appeals correctly applied this Court's holding in *North Carolina v. Pearce*, 395 U.S. 711 (1969), to the facts of this case.

Statement of The Case

On July 19, 1968, Mr. Wayne Rice was tried in a North Carolina General County Court upon his plea of not guilty to a charge of driving while intoxicated. Found guilty by

the court, he was sentenced to nine months in prison suspended upon payment of a $100 fine plus costs. This was Mr. Rice's first conviction for driving while intoxicated. Immediately following his conviction and pursuing the only course available to him for objecting to his conviction, Mr. Rice appealed to the Buncombe County Superior Court for a trial de novo. N.C.G.S. § 7-296.11. Two weeks later, on August 2, 1968, he was tried and found guilty of the same offense by a Superior Court jury. The presiding judge then imposed an active sentence of two years in prison—the maximum authorized by law. N.C.G.S. § 20-179.

The reasons for the imposition of this remarkably harsher sentence do not affirmatively appear in the record. Rather, "the record reveals nothing which warrants the increased punishment." (434 F.2d at 300.) All that appears is that as a result of exercising his sole statutory right to appeal, that providing for de novo retrial with sentence to be imposed by the court, Mr. Rice found himself sentenced to two years in prison. Had he been willing to forego his only right to appeal, he would have had to pay only a $100 fine plus costs. Reviewing these circumstances in light of this Court's decision in *North Carolina v. Pearce*, 395 U.S. 711 (1969), the United States Court of Appeals for the Fourth Circuit concluded (434 F.2d at 300):

> [W]e again see the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.

Although Mr. Rice had in the meantime completed his full two years of penitentiary service and had been unconditionally discharged from prison prior to argument and decision in the court of appeals, the court concluded that "injurious consequences" might nonetheless subsequently attach to the public record of his impermissibly severe sentence. (*Ibid.*) On that basis it concluded that the case was not in fact moot and that relief should be granted by remanding the case to the district court with directions to order that the record be expunged. Thereafter, the State sought *certiorari* from this Court.

Reasons For Denying The Writ

1. *The Decision Below is Clearly Correct.*

While never conclusive of this Court's discretion, and while inappropriate for development at length in this brief, the essential soundness of the Opinion and decision below in light of this Court's own most recent and emphatic pronouncements provide sufficient reason in themselves not to burden the Court or to postpone the effective date of the lower court's order through the exercise of the *certiorari* power.

The imposition upon Rice of a harsher sentence upon retrial for the same offense was a clear violation of the principles established by this Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969). The issue presented in *Pearce*, as stated by this Court, is exactly the same as the issue identically resolved by the court below in this case:

> When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial? (395 U.S. 711, 713)

In answer to that question, this Court declared:

> [S]ince the fear of . . . vindictiveness may constitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, Due Process . . . requires that a defendant be freed of apprehension of such a retaliatory motivation. (395 U.S. 711, 725)

It thereupon held that:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be

> made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. (395 U.S. 711, 726)

As the State in this case failed to produce any record whatever in explanation of the doubly severe harsher sentence imposed upon Mr. Rice following his retrial, much less a record disclosing objective information concerning any conduct on his part during the brief two-week interval between the imposition of the first and second sentences, the court below correctly concluded that the harsher sentence was imposed in violation of the Due Process Clause of the Fourteenth Amendment.

There is, accordingly, no point to review this case unless it is felt that there is some purpose to be served merely to reiterate what is otherwise obvious, a purpose which it is respectfully submitted may at most warrant issuance of the writ followed by summary affirmance of the decision below. It is clear, as determined by the court of appeals unchallenged by Petitioner in this Court, that at the time of his original conviction in the General County Court Mr. Rice's sole recourse was by appeal to the Superior Court for a trial de novo. He could not, under the applicable law of North Carolina, have appealed directly to any other court nor could he, by any other means, seek relief from any error he might believe to have prejudiced his trial. There can be no question, of course, that "apprehension of a retaliatory motive" (*Pearce* at 725) respecting sentencing after retrial de novo must as readily deter defendants from seeking relief from any felt injustice arising in the course of their trial in such an inferior court as a general county court, as it would in the case of one originally tried in a higher court of first instance. Indeed, while that chilling apprehension must be at least as great in both cases, the defendant's predicament in this case is made far more acute by the very fact that the less professional and less circumspect operation of the general county court (in which the judge need not be an attorney and no record is made of the proceedings) is itself much more

conducive to the probability of error in the proceedings than was likely in the kind of court, a Superior Court, in which Pearce was first tried. So it is that the court of appeals concluded in this case:

> On the strength of *Pearce*, we again see the more drastic sentence on the second trial as a denial of Federal due process, *in that by discouragement it impinges upon the State-given appeal.* (434 F.2d at 300). (Emphasis added.)

Indeed, the *a fortiori* application of *Pearce* to *Rice* had already been anticipated in *Torrance v. Henry*, 304 F. Supp. 725 (E.D.N.C. 1969). (See also *Sefcheck v. Brewer*, 301 F. Supp. 793 (S. D. Iowa 1969); *Cherry v. Maryland*, No. 244 (Md. Ct. of Spec. App., May 6, 1970) (harsher sentencing without explanation following retrial de novo held forbidden by *Pearce*; Alpin, *Sentences Increases on Retrial after North Carolina v. Pearce*, 39 U.Cin.L.Rev. 427 (1970).) Like *Rice, Torrance* arose on petition for a writ of habeas corpus in behalf of a North Carolina prisoner who, after being convicted in an inferior court and appealing to the Superior Court, was tried de novo, convicted again of the same offense, and given a greater (and unexplained) sentence than had been imposed by the inferior court. In his Opinion, Chief Judge Butler declared:

> Respondent contends that the *Pearce* case applies only in cases where there has been a successful attack on a conviction, not in cases of a trial *de novo* as presented here.
>
> Applying the reasoning underlying *Pearce*, we perceive no material distinction between a case where the defendant's original conviction has been set aside, whether by appeal or collateral proceedings, and a new trial ordered, and a case where the defendant has appealed his original conviction, and received a trial *de novo*. In either case a harsher sentence at retrial is a violation of due process, unless justified by the subsequent events requirement as enunciated in *Pearce*. (304 F. Supp. 725, 726)

In brief, *Pearce* stands for the proposition that a convicted defendant should not in any way be discouraged from seeking review of his conviction from fear of incurring

increased punishment unrelated to his own conduct subsequent to that conviction. Since requesting a trial de novo was the sole method of review open to Rice following his conviction in the General County Court, since the state provided no way whatever for him to seek redress from any kind of error which might have tainted his conviction without incurring a flat risk of purely vindictive and utterly retaliatory harsher sentencing not thereafter subject to any meaningful review due to the absence of explanation appearing on the face of the Superior Court record, the decision in the court below was indubitably correct and so wholly an unexceptional application of *Pearce* as clearly not to warrant further consideration by this Court.

2. *The Issue Allegedly Presented Is Inappropriate For Review By The Court At This Time And, In Light Of The Factual Record, The Case Itself Is Singularly Inappropriate For Further Consideration.*

Petitioner cites no case which has arisen within the Fourth Circuit subsequent to and at variance with the decision below. There is, as a consequence, no decisional conflict currently existing within the circuit and thus no need for this Court to grant the writ merely to resolve such differences as may never arise. Respectfully, moreover, Respondent submits that it is premature to anticipate any such conflict in the absence of providing a reasonable opportunity to the several state supreme courts within the fourth circuit to consider the *ratio decidendi*, as well as the holding, in this case.

The capacity of this Court to reconcile such differences as might arise in the future (and no reason is yet apparent to suppose that there will in fact be any differences) may in any event be enhanced by providing an opportunity to these courts as well as others to consider the matter and to develop any additional facts which might appropriately suggest some tenable distinction or limitation upon the case. Indeed, as noted in Petitioner's brief itself (at p. 4), only one other federal court of appeals has yet had any occasion even to consider the particular issue raised by

this case, in spite of Petitioner's own declared view that the problem which that issue allegedly presents is one which may be shared in at least twenty-three states. Surely, then, it is premature to act in the absence of knowing whether in fact the decision may be regarded as generating any problem at all or whether any State may think the decision in the slightest degree incompatible with its capacity for the fair administration of justice.

Given the fact that the decision below exhibits no departure from any decision of this Court but, to the contrary, merely articulates a specific and reasoned application of this Court's very recent holding in *North Carolina v. Pearce*, given also the absence of any compelling need to review the particular order of the court below in order to protect any interest of the state immediately affected by that order (*i.e.*, the State had already unconditionally released Mr. Rice even before argument and decision in the court below), and given the state of the Record in this case with its utter lack of any attempt to justify the shockingly severe increase in punishment following Rice's sole recourse by way of statutory appeal, it is respectfully submitted that this case is singularly inappropriate for further consideration.

Conclusion

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

William W. Van Alstyne
Counsel for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ~~1325~~ 70-77

NORTH CAROLINA,
Petitioner,

v.

WAYNE CLAUDE RICE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR STATE OF MAINE AMICUS CURIAE

May 18, 1971.

JOHN W. BENOIT, JR., Esq.
Deputy Attorney General
State House
Augusta, Maine 04330

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IN THE

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October Term, 1970

No. 1325

NORTH CAROLINA,
Petitioner,

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR STATE OF MAINE AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Circuit Court's opinion disagrees with an earlier decision of the Court of Appeals for the First Circuit in Lemieux v. Robbins (1969), 414 F.2d 353, cert. den. 397 U.S. 1017, 90 S.Ct. 1247,

25 L.Ed.2d 430 (1970); a case with like facts. Maine's procedures affording a defendant a jury trial de novo following disposition in a court of limited jurisdiction, sustained in Lemieux v. Robbins, will be adversely affected by affirmance of the Fourth Circuit's decision here.

ARGUMENT

I.

THE CIRCUIT COURT HAS ERRED IN EQUATING AN "APPEAL" FROM A COURT OF LIMITED JURISDICTION TO THE SUPERIOR COURT WITH A DEFENDANT'S "RIGHT OF APPEAL" FROM A SUPERIOR COURT TO AN APPELLATE COURT.

The main authority relied on by the Fourth Circuit is North Carolina v. Pearce (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656, but that case is distinguishable on its facts. In Pearce, a jury trial conviction was followed by appellate review and subsequent retrial followed by imposition of a more drastic sentence than had first occurred. The

case involved exercise of a defendant's single "right of appeal".

The present case is not strictly an "appeal" within the tenor of Pearce. Rather, it is more an application for jury trial de novo in the Superior Court, not available earlier in the court of limited jurisdiction. Unlike the situation in Pearce, the application need not demonstrate error. Indeed, proceedings in the court of limited jurisdiction can be exceedingly minute if a defendant does not wish to go to hearing. In such instances, he may plead not guilty and waive a hearing. Under Maine procedure, the court of limited jurisdiction will then impose sentence and defendant may apply forthwith to the Superior Court for jury trial de novo. District Court Criminal Rule 40. On such application, the entire case is

moved to Superior Court where both defendant and the State start at parity. District Court Criminal Rule 39. Defendants have the benefit of two full opportunities for acquittal under the procedure in Maine, North Carolina and other jurisdictions having like procedures. Evans v. City of Richmond (1969), 210 Va. 403, 171 S.E.2d 247; People v. Olary (1969), 382 Mich. 559, 170 N.W.2d 842; and State v. Stanosheck (1970), 186 Neb. 17, 180 N.W.2d 226.

II.

THE TWO-STEP "APPEAL PROCEDURE" PRESENT IN BOTH THIS CASE AND IN LEMIEUX SERVES A LEGITIMATE PURPOSE AND IS FAIR AND REASONABLE.

The defendant in the present case lost nothing by first going to hearing in the court of limited jurisdiction followed by application to the Superior Court for de novo jury trial. The decision of the

Fourth Circuit does not rest upon any showing of prejudice to Rice.

The reference procedure serves a legitimate interest of the State in seeking a reduction of the Superior Court case load. Too, the procedure in North Carolina (and in Maine) permits the defendant to appeal any adverse jury verdict in the Superior Court to the state appellate court.

Adoption of the decision of the Fourth Circuit, and rejection of the decision on like facts in Lemieux in the First Circuit, would result in courts of limited jurisdiction tending to give maximum sentences out of caution, perhaps in the interest of the state, which would likely have the effect of encouraging "appeals" to the Superior Court or, conversely, if the courts of limited jurisdiction tended to impose

smaller sentences, the state would likely avoid the courts of limited jurisdiction in favor of initiating cases in the Superior Court in the first instance. This reasoning expressed in Lemieux, seems logical and persuasive.

The Fourth Circuit's decision makes serious inroads upon established court procedures in several states, sans comment except that the Court does not agree with the reasons given for sustaining those procedures. The decision being reviewed compels Superior Courts to exercise sentencing jurisdiction only to the extent of the sentence of an inferior court. As noted by the First Circuit in Lemieux, the Supreme Court has never held that a state must establish channels of appellate review, but only that once established, the state must not place unreasonable restrictions on access. Pearce. Looking at the

total circumstances, the procedures involved here are reasonable and support legitimate state objectives.

In Maine, an "appeal" from the State District Court to Superior Court does not have the result of a writ of error, and there is no remand to the lower court from Superior Court. Willet v. Clark, 103 Me. 22, 67 A. 566. Where there is no review of alleged error below, but rather a new trial, the distinction is important. Lemieux v. State, et al (Maine, 1968), 240 A.2d 206. Maine seeks affirmance of the reasoning given on the question by the First Circuit in Lemieux v. Robbins, and includes that decision in the Appendix, page 3.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

John W. Benoit, Jr.

JOHN W. BENOIT, JR.
Deputy Attorney General
State House
Augusta, Maine

APPENDIX

1. District Court Criminal Rule 37(a):

"An aggrieved defendant may appeal from a judgment of the District Court to the Superior Court in the county in which the Division of the District Court entering judgment is located. * * * "

2. District Court Criminal Rule 39 (a), (b), (c):

"Prior to the holding of the Superior Court to which the appeal is taken, the Clerk shall transmit to said appellate court the whole process and all writings and exhibits in the District Court pertaining to the case in which said appeal has been taken.

"The appellant shall be entitled to a trial de novo in the Superior Court and the proceedings therein shall be in accord with the Maine Rules of Criminal Procedure.

"An appellant may, at any time before the appeal has been docketed in the appellate court, come personally, or by leave of court, by his attorney, before the judge, who may permit him, on motion, to withdraw his appeal and abide by the sentence appealed from; whereupon,

the appeal shall be withdrawn. If the appellant is detained in jail for failure to give bail to prosecute his appeal, he may give notice in writing to the Clerk of the court of his desire to withdraw his appeal and abide by the sentence appealed from; whereupon his appeal shall be withdrawn."

3. District Court Criminal Rule 40:

"In all prosecutions in the District Court, the defendant may plead not guilty and waive a hearing, whereupon he shall be sentenced as provided in Rule 32 of these rules and may appeal as provided in Rule 37, as if there had been a full hearing.

"In those cases in which the clerk may accept a guilty plea upon payment of a fine under Rule 10 the defendant may plead not guilty and waive a hearing before the clerk, whereupon the clerk shall impose sentence, accept his notice of appeal, and fix and take bail as if there had been a full hearing.

"Failure of a defendant, prior to taking an appeal pursuant to this rule, to present any defense or objection which must be raised under Rule 12 will constitute a waiver thereof."

CERTIFICATE OF SERVICE

Pursuant to the Rules of the Supreme Court of the United States, the undersigned, counsel for State of Maine Amicus Curiae, on the date written below, did deposit a copy of the above Brief for State of Maine Amicus Curiae in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to respondent's attorney as follows: William W.Van Alstyne, Esquire, Duke University, School of Law, Durham, North Carolina 27706.

Dated: May 18, 1971.

John W. Benoit, Jr.

JOHN W. BENOIT, JR.
Deputy Attorney General
State House
Augusta, Maine 04330

United States Court of Appeals
For the First Circuit

No. 7296

FRANCIS T. LEMIEUX,
PETITIONER, APPELLEE,

v.

ALLAN L. ROBBINS, Warden,
Maine State Prison,
RESPONDENT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

John W. Benoit, Jr., Assistant Attorney General for appellant.
Jeremiah D. Newbury, with whom *S. Mason Pratt, Jr.*, and *Pierce, Atwood, Scribner, Allen & McKusick* were on brief, for appellee.

August 22, 1969.

ALDRICH, *Chief Judge*. On April 29, 1966 petitioner Lemieux assaulted one Judy Files. A complaint was lodged against him in the local district court charging an offense under 17 Maine R.S.A. § 201.[1] Petitioner pleaded not guilty.

[1] "Whoever unlawfully attempts to strike, hit, touch or do any violence to another however small, in wanton, willful, angry or insulting manner, having an intention and existing ability to do some violence to such person, is guilty of an assault. If such attempt is carried into effect, he is guilty of an assault and battery. Any person convicted of either offense, when it is not of a high and aggravated nature, shall be punished by a fine of not more than $100 or by imprisonment for not more than 6 months, or by both. When the offense is of a high and aggravated nature, the person convicted of either offense shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 5 years, when no other punishment is prescribed."

Following trial to the court he was found guilty and fined. Pursuant to Maine District Court Criminal Rules 37(a), 39(a), and (b) he "appealed" to the Superior Court for a trial de novo to a jury. The state thereupon presented petitioner to a grand jury, which indicted him for the same assault, following which action the state dismissed the complaint. Petitioner was tried to a jury in the Superior Court on the indictment, found guilty, and sentenced to a term of 1 1/2 years — 5 years.[2] Post-conviction relief having failed in the state court, petitioner brought habeas corpus proceedings in the District Court to obtain his discharge. The court ordered the relief, 294 F.Supp. 1171, and the state appeals.

We will deal first with the issue of double jeopardy, extensively argued by the petitioner but not reached by the court below. This claim has two aspects. The simple one, that placing petitioner in the position of having his sentence increased constituted double jeopardy, has now been resolved against him by *North Carolina* v. *Pearce*, U.S. (6/23/69), 37 U.S.L.W. 4601. Failing here, petitioner makes a more complex argument: that he was convicted in the Superior Court of a different, and greater, offense, albeit under the same statute, in violation of *Green* v. *United States*, 1957, 355 U.S. 184.

Until recently the Maine court held that simple assault and aggravated assault were the same offense, and that the difference was only in the sentence. *State* v. *McKrackern*, 1945, 141 Me. 194, 207-08, 41 A.2d 817, 822. *Accord*, *State* v. *Bey*, 1965, 161 Me. 23, 206 A.2d 413; *Bell* v. *State*, 1939, 136 Me. 322, 9 A.2d 129. Subsequent to petitioner's conviction the Supreme Judicial Court held in *State* v. *Ferris*, 1969, Me., 249 A.2d 523 that a defendant is entitled to a jury determination of the element of aggravation. From this rul-

[2] If petitioner had been tried on the complaint in the Superior Court his maximum sentence would have been six months.

ing it may be argued that aggravated assault is a separate offense. However, even if we were to disregard the court's pronouncement of non-retrospectivity of this ruling, petitioner is not helped by a concept of two offenses.

In *Green* the defendant, tried for first degree murder and convicted of murder in the second degree, obtained a new trial, only to be convicted of a first degree killing. The Court set this conviction aside, holding that the defendant had been duly acquitted of this offense at the first trial. This principle is inapplicable to the petitioner. The state district court had jurisdiction only over misdemeanors, 4 Maine R.S.A. §§ 152, 165, and therefore could not convict petitioner of aggravated assault, whether there be one offense, or two. Since it could not convict him, he was not in jeopardy. *State* v. *Barnette,* 1962, 158 Me. 117, 179 A.2d 800; *Commonwealth* v. *Mahoney,* 1954, 331 Mass. 510, 120 N.E.2d 645. *See* Kirchheimer, The Act, the Offense, and Double Jeopardy, 58 Yale L.J. 513, 530 & n.78 (1949). *Cf. Diaz* v. *United States,* 1912, 223 U.S. 442. Petitioner attaches significance to the fact that the district court did not exercise its option to bind him over to the Superior Court. This amounts to no more than a failure to find probable cause for prosecution for the aggravated offense. This is not jeopardy. *United States ex rel Rutz* v. *Levy,* 1925, 268 U.S. 390; *Wampler* v. *Warden of the Maryland Penitentiary,* D.Md., 1963, 218 F.Supp. 876.

We turn to the more difficult question whether permitting the state to impose a larger sentence following defendant's "appeal" was, as found by the court below, an unconstitutional limitation on the right of appeal. The court relied upon *Marano* v. *United States,* 1 Cir., 1967, 374 F.2d 583. We believe this reliance misplaced. In *Marano* the defendant, whose conviction was reversed on appeal, was retried and again convicted. Stating that the evidence on the second trial showed the defendant to have been

more deeply connected with the offense than he had previously appeared to be, the district court imposed a larger sentence. We reversed, holding that it was constitutionally impermissible to expose the defendant to a higher sentence for such a reason as the price of taking an appeal. We did not say, however, as the court did subsequently in *Patton* v. *North Carolina,* 4 Cir., 1967, 381 F.2d 636, 641, that under no circumstances could a larger sentence be imposed. We recognized possible grounds for an increase, saying by way of dictum that the sentencing court might take into consideration subsequent conduct of the defendant. 374 F.2d at 585. By this we meant that our statement in *Worcester* v. *Commissioner,* 1 Cir., 1966, 370 F.2d 713, 718, that an appeal must be "unfettered," did not mean that no "chilling effect" could ever be attached to an appeal; the question must be one of reasonableness. We find this view precisely confirmed by the Supreme Court in *North Carolina* v. *Pearce, supra.*

With this background we examine the present procedure, finding it very different from what was involved in *Marano.* Petitioner's so-called appeal was not an appeal predicated upon, or dependent upon, error, but was a claim, as of right, of a trial de novo. M. D. Ct. Crim. R. 37(a), 39(b). From the Superior Court the defendant could have the customary appeal to the Supreme Judicial Court. The purpose of the district court "appeal" was to afford petitioner his right to a jury trial under the state constitution.[3] To say that to cause him to lose the "benefit" of the district court sentence incumbers or "chills" this

[3] In Maine, it has been said, there is apparently no limitation on the right of one accused of even petty offenses to obtain a trial by jury on appeal from a court of limited jurisdiction. 3 Glassman, Maine Practice, Rules of Criminal Procedure, §23.2. In any event, in the absence of waiver manifestly petitioner could not have received his present sentence without a jury trial. *Duncan* v. *Louisiana,* 1968, 391 U.S. 145.

appeal is to assume the point. Rather, the question is, was the state constitutionally obliged to grant him this benefit, or was the procedure as a whole a reasonable one.

In answering this question we must have in mind that a defendant gives up nothing by going to trial in the district court. Nor, unlike the situation in *Pearce*, need he demonstrate error, constitutional or other, in a first trial to secure a second trial, which very proof of error gives the state the opportunity to increase the punishment. Such is indeed a one way street. Here we deal with a two way street. Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to "appeal" not only gives him a new trial but vacates the judgment and removes the entire case to the Superior Court. The state is willing to accept this in the long-run interest of reducing the load on the Superior Court. The defendant need not accept it at all.[4] If he does accept it, both he and the state start at parity; should he elect to take advantage of a second and fresh opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity.

We realize that if a defendant chooses a district court trial he may thereafter be reluctant to seek correction of any errors committed therein if to do so he must risk a sentence he considers favorable. In this sense the state has "chilled" his exercise of appeal. However, the "right" to appeal is by no means an absolute one. Indeed, the Supreme Court has never held that a state must establish channels of appellate review, only that once estab-

[4] A defendant need not even go to trial in the district court if he does not wish to. Under District Court Criminal Rule 40 the defendant may plead not guilty and waive a hearing. The court will then impose sentence and the defendant may appeal forthwith to the Superior Court.

lished, the state must refrain from placing unreasonable restrictions on access. *See North Carolina* v. *Pearce, supra,* at 4605; *cf. United States* v. *Coke,* 2 Cir., 1968, 404 F.2d 836, 843. But even assuming that there is a constitutional right to some sort of post-conviction review, *see* Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606, 613 & n.25 (1965), procedures which merely "chill" this right must be tolerated if they support legitimate state objectives and are fair and reasonable.

Looking at the total circumstances, where the state offers the defendant a full trial, with full right of appeal therefrom, in the Superior Court, we do not think it unreasonable for it to restrict the appeal from the district court in the sense here complained of. Were we to hold that the district court sentence was subject to *Marano* conditions one of two results would be likely to occur. Either the district courts would tend to give maximum sentences out of caution, in the interest of the state, which, in turn, would have the effect of encouraging "appeals," or, if the district courts tended to give small sentences, the state would be led to avoid the vesting consequences by initiating cases in the Superior Court in the first instance. The state's two step procedure has a legitimate purpose. We see no occasion for us to expose it to any such dilemma. Rather, we hold the defendant has no constitutional right to complain of a "chilling effect" when, in effect, he need not stand in the draft in the first instance.

The judgment of the District Court is vacated. The petition is dismissed.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-77

No. ~~1225~~

STATE OF NORTH CAROLINA,

Petitioner,

vs.

WAYNE CLAUDE RICE,

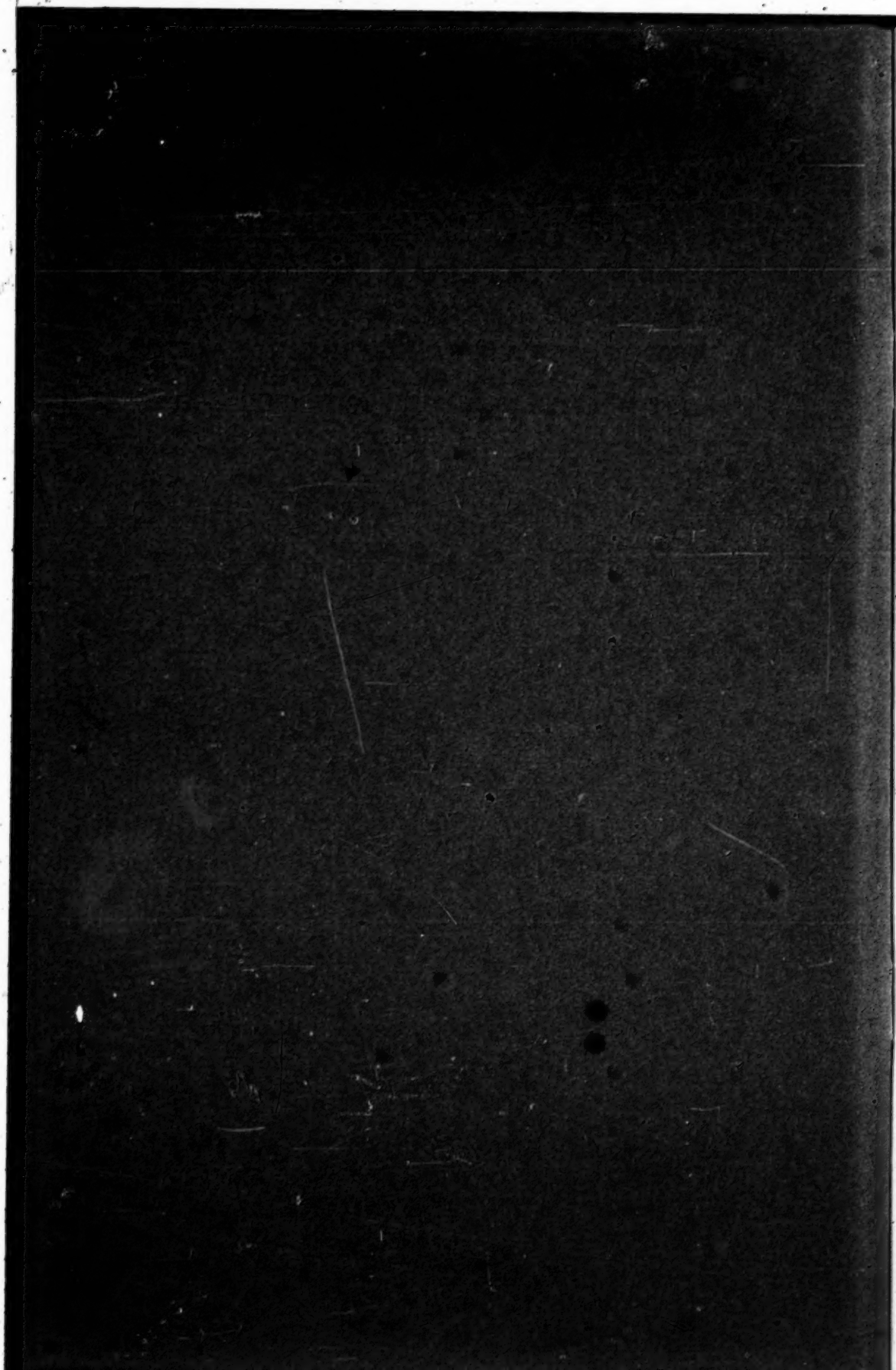
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, AMICI CURIAE

VERNON B. ROMNEY
Attorney General

236 State Capitol
Salt Lake City, Utah



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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1325

STATE OF NORTH CAROLINA,

Petitioner,

vs.

WAYNE CLAUDE RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, AMICI CURIAE

INTEREST OF AMICI

The specific issue presented to this Court in *North Carolina* v. *Rice,* No. 1325, is one in which an adverse decision could have a substantial impact on the criminal court structure of many states, including Utah. Such a decision holds the promise of converting the lower criminal trial courts of this state into mere "deadwood", which would necessarily require a comprehensive revision of Utah's judicial code.

STATEMENT OF THE CASE

Rice was arrested on July 2, 1968, on a North Carolina state highway in violation of G.S. § 20-138, (persons under the influence of intoxicating liquor or narcotic drugs). On July 19, 1968, in the General County Court of Buncombe County, Rice was convicted and sentenced to imprisonment for nine months, with suspension of that sentence upon the payment of a fine of $100.00, plus court costs. On appeal to the Superior Court of the County, Rice was found guilty and committed to two years' imprisonment. This Court granted Certiorari on the 5th day of April, 1971, limited to the issue:

> "Did imposition of a greater sentence following jury trial and conviction in superior court, after accused exercised his legal right to trial de novo upon appeal from conviction and sentence by inferior court, violate the Due Process Clause?"

ARGUMENT

I.

IMPOSITION OF A GREATER SENTENCE AFTER A TRIAL DE NOVO OR A "NEW TRIAL" DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Utah, as well as a number of other states, has embodied within its judicial structure a system of dual levels of court. Consequently, a defendant who is charged with a less serious offense may be initially tried in one of Utah's inferior courts, with the unfettered right to appeal any conviction therein. Any defendant who is dissatisfied with the judgment rendered against him in the inferior court, to-wit: the justice and city courts, may, by statute, apply for a *new trial* in the

state district court. Utah Code Ann. § 78-4-17 (1953) reads:

> "A motion for a *new trial* may be made, and from any final judgment an appeal may be taken by either party in a civil case or by the defendant in a criminal case to the district court of the county, in the manner and with the same effect as provided by law for motions for new trials in and appeals from justices' courts in similar cases; . . ." (Emphasis ours.)

Utah Code Ann. § 78-5-14 (1953) reads:

> "Any person dissatisfied with a judgment rendered in a justices' court, whether the same was rendered on default or after trial, may apply for a *new trial* or appeal therefrom to the district court of the county within the time and in the manner provided by law." (Emphasis ours.)

What is the effect of a "new trial" in Utah? The Legislature has been quite explicit in both defining the term "new trial" and of confining the scope of review in that trial. More specifically, the Utah Legislature has defined a "new trial" to mean just that; a trial in which the parties are put in parity to each other and the formalities of judicial procedure are completely re-enacted. Utah Code Ann. § 77-38-1 (1953) states:

> "A new trial is a re-examination of the issue after a verdict or decision has been given."

Utah Code Ann. § 77-38-2 (1953) goes on to say:

> "The granting of a *new trial shall place the parties in the same position as if no trial had been had.* All evidence must be produced anew, and the former verdict or decision shall not be used or referred to either in evidence or in argument, nor be pleaded in bar of any conviction which might have been had under the information or indictment." (Emphasis ours.)

Additional refinements of Utah's judicial procedure regarding the defendant's right to appeal can be found in Utah Code Ann. § 77-57-38 (1953), which allows any defendant convicted in the justice court to appeal to the state district court. Utah Code Ann. § 77-57-43 (1953) also states:

> "An appeal duly perfected transfers the action to the district court for a new *trial anew.*" (Emphasis ours.)

In all criminal cases, there is provided a jury trial where there is an issue of fact. Utah Code Ann. § 77-27-2 (1953). Thus, where a defendant has been tried in the inferior courts, and an appeal or a new trial is granted, the new trial or appeal is conducted as an ordinary jury trial before the district court.

Quite obviously then, in Utah, the defendant's right to appeal for a "new trial" from an adverse decision in an inferior court is deeply rooted in the notion that when that new trial is granted, the defendant will stand in exactly the same position as he did prior to his conviction in the inferior court. This "new trial" theory becomes particularly important in criminal cases, because it places the burden upon the state, for the second time, to show beyond a reasonable doubt that the defendant is guilty of the crime he is accused of. The defendant is given a second chance to establish the presumption of his innocence. In fact, this "new trial" approach, which is statutorily imposed in Utah, is the very same approach taken by the court in *Lemieux* v. *Robbins,* 414 F. 2d 353 (1st Cir. 1969); cert. den. 90 S. Ct. 1247, 397 U. S. 1017, 25 L. Ed. 432.

> "Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to 'appeal'

> not only gives him a new trial but vacates the judgment and removes the entire case to the superior court . . . [S]hould he elect to take advantage of a second and fresh opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity." 414 F. 2d 355.

In *United States, ex rel. Starner* v. *Russell,* 378 F. 2d 808 (3rd Cir. 1967), the court expressed a view not unlike the court in *Lemieux,* when it stated:

> "When he appeared and entered a plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered." 378 F. 2d 811.

Consequently, the trial in an inferior court in Utah is considered to be a nullity, when the defendant is granted a new trial. Because of this view, there are a number of reasons why the defendant in a new trial should be held to have waived all of the consequences of the first trial and begin completely anew as the state is required to do.

One important factor lies in the trial judge's discretion in sentencing matters. The general rule has been that the length of the sentence imposed upon a defendant is a matter which should be left to the discretion of the trial judge. The obvious reason, of course, is the fact that the trial judge does possess a certain degree of expertise regarding the specific case before him. He alone is in the best position to determine the appropriate sentence and, therefore, his evaluation should be honored. The State of Utah realizes that such an argument holds true for the inferior trial judge's sentence decision as well. However, since the defendant in such cases has seen fit to exercise his statutory right to appeal, all of the results in

the new trial, including the sentence, are statutorily and completely independent of the trial in the inferior court. By deciding to appeal, the defendant has elected to accept all of the benefits and the risks of the new trial. As the court in *Starner, supra,* said:

> ". . . when he elects to have his case retried before a jury, he takes a chance after conviction on the trial judge's discretion in sentencing him." 378 P. 2d 811.

The second important factor for wiping the slate clean is the fact that in many cases, a substantial amount of objective information relevant to the sentencing is developed during the interim of the two trials. Obviously, to disallow the trial judge to take cognizance of that information would be an infringement upon justice. As this Court said in *North Carolina* v. *Pearce,* 395 U. S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969):

> "It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant . . ." 395 U. S. 724.

The Court goes on quoting from *Nichols* v. *United States,* 106 F. 679 (8th Cir. 1901):

> "A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant . . ." 395 U. S. 724.
>
> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked him must play no part in the sentence he receives after a new trial." 395 U. S. 725.

The Court did, however, say:

> "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities'. . . ." (quoting from *Williams* v. *New York*, 337 U. S. 241 at 245.)
>
> "The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams* v. *New York, supra,* that a state may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime'." 337 U. S. 245.
>
> "In order to assure the absence of such a [punitive] motivation we have concluded that whenever a a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." 395 U. S. 726.

In light of the *Pearce* decision, *supra,* it is the position of the State of Utah that as long as those reasons for a greater sentence are affirmatively set out, the defendant has in no way been denied Due Process of Law by receiving a different sentence in his new trial, even when those reasons go to the "life, health, habits, conduct and mental and moral propensities." *Williams, supra,* at 245. It is our position that many times during the course of a new trial in the District Court of Utah, information and evidence, not available at the time of the first trial, is brought forward at the new trial — information which may not necessarily be based upon identifiable conduct on the part of the defendant occuring after the orig-

inal sentencing, but information which is vital to both sides regarding the guilt or innocence of the defendant. Consequently, because this trial is a new trial in all respects, the information should be available to the judge in his sentencing of the defendant. It should be recognized that any new information or evidence could result in a lesser sentence as well as a greater sentence.

It is this point, the State of Utah feels, that distinguishes *Pearce, supra,* from the issue in the instant case. In *Pearce,* the original conviction was set aside for constitutional error. However, the issue in the *Rice* case is not one of reversal on constitutional error, but rather one of a trial anew in all respects; a trial which completely re-initiated all of the legal procedures, formalities, and rules available to the defendant; one in which no reference whatsoever was made to the original proceeding during the entire course of the trial de novo — essentially the same statutory procedure utilized by Utah in granting "new trials" from inferior courts. In a retrial situation, such as *Pearce,* the entire second proceeding is based upon what happened or did not happen in the initial trial. The existence of that second proceeding is predicated upon the first proceeding. Such, however, is not the case with a "trial de novo" or the "new trial" procedure as expressed by statute in Utah. Not only is that trial in the inferior court completely disregarded in the second proceeding, but the defendant is also given a second chance to prove his innocence after his guilt has been established in the lower court. Surely, the very system which gives the defendant the benefit of making the state prove its case twice should not further hamstring the state and the judicial process by denying it the use of the trial judge's expertise in the case, and

any subsequent information which may shed light on the guilt or innocence of the accused.

The State of Utah submits that the issue here presented falls squarely within the legal theory expressed in *Pearce and Williams* when the court said that a judge is not constitutionally precluded from imposing a greater sentence in a second trial when events subsequent to the first trial throw light upon the defendant's "life, health, habits, conduct, and mental or moral propensities." In *Pearce,* this concept was restrained to double jeopardy and the Equal Protection Clause. However, since a "trial de novo" or "new trial" is a trial anew, the State of Utah submits that the "greater sentence" theory of *Pearce* and *Williams* should be expanded to encompass Due Process of Law in a "new trial"; to wit: The Due Process Clause is in no way violated when in a "trial de novo" or "new trial" the judge imposes a greater sentence upon the defendant than he received in his first trial; when the reasons for the greater sentence affirmatively appear and are based upon objective information concerning the defendant's life, health, habits, conduct or mental and moral propensities.

Yet, another reason exists why this court should reverse the Fourth Circuit decision in *Rice, supra.* The reason lies in the area of balancing the interest of the defendant to his right to appeal in most states as opposed to the legitimate state interest of relieving appellate court congestion. The right of appeal is not specifically guaranteed by the Constitution, nor can it be considered an implicit requirement of due process. In *Griffin* v. *Illinois,* 351 U. S. 12 (1956), this court said:

> "It is true that a state is not required by the Federal Constitution to provide appellate courts of a right to appellate review at all."

Also, in *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966) this Court said:

> "This Court has never held that the states are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of *unreasoned* distinctions that can only impede open and equal access to the courts. Griffin v. Illinois, 351 U. S. 12; Douglas v. California, 372 U. S. 353; Lane v. Brown, 372 U. S. 477; Draper v. Washington, 372 U. S. 487." 384 U. S. 310, 311. (Emphasis ours.)

However, where the appellate avenues are established, they "must be kept free of *unreasonable* distinctions." (Emphasis ours.) *Rinaldi, supra.* We submit that the interest intended to be protected here is not only a reasonable interest, but also one in which the states have a compelling interest in retaining. This Court is well aware of the crowded situation that exists, not only on its own calendar, but also on the calendar of practically every court of this country. This is not to imply that the crowded court dockets of this nation is a justifiable reason, in and of itself, for "chilling" one's right to appeal. It most certainly is not. However, other considerations are involved.

At the present time, at least twenty-two states, including Utah, have established within their judicial procedures' system a dual court arrangement which allows a convicted defendant to appeal for a "trial de novo" or a new trial.[1]

---

[1] ARIZONA—A.R.S. Section 22-374.
ARKANSAS—Ark. Stat. Sections 44-501, 502 and 509.
COLORADO—Rule 37(f) Colo. Rules of Crim. Pro.
FLORIDA—Constitution of Florida, Art. V, Sections 11(2) and 6(3). See also F.S.A. Sections 932.53, 54, 55 and 56.
INDIANA——Burns' Ind. Stat. Ann. Section 9-721.
KANSAS—K.S.A. Section 22-3610.

Consequently, the ramifications of an adverse decision in this case could have horrendous consequences on the judicial procedures in many states. If the higher court, the District Court in Utah, could not impose a greater sentence, when such a sentence was consistent with additional information gathered subsequent to the first trial, every defendant would automatically appeal that initial conviction. The result is twofold. First, because of the substantial influx of appeals, the appellate dockets become even more crowded. Second, the role played by the inferior courts in the states' judicial procedures is completely voided, since that role would be reduced to mere procedure without any substantive value whatsoever. This in turn could only result in a complicated and expensive reconstruction of the judicial procedures in at least twenty-two states.

KENTUCKY—K.R.S. Section 23.032 and Rule 12.06 Ky. Rules of Crim. Pro.

MAINE—Me. Rules of Crim. Pro., Dist. Ct. Rules 37(a) and 39(a), (b) and (c).

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TEXAS—Vernon's Ann. Code of Crim. Pro. Sections 44.17 and 45.10.

VIRGINIA—Va. Code Section 16.1-136.

WASHINGTON—R.C.W. Sections 3.50.280 and 3.50-410.

It is also apparent that the state has a compelling or legitimate interest for another reason. As was previously stated, many times between a trial in an inferior court and a new trial in a district court, additional information regarding the defendant is discovered, which may bear on his guilt or innocence. As the court in *Williams, supra,* stated:

> ". . . statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." 337 U. S. 247.

Consequently,

> ". . . The state may have an important interest in the imposition of a sentence that appears just in light of the latest and best information." *United States* v. *Coke,* 404 F. 2d 836, 843 (2nd Cir. 1968).

The State of Utah submits, in the words of the Court in *Lemieux, supra*:

> ". . . procedures which merely 'chill' this right must be tolerated if they support legitimate state objectives and are fair and reasonable." 414 F. 2d 356.

It is an undeniable fact that if this Court affirms the decision in *Rice, supra,* that the result will be an influx of appeals to the already overcrowded appellate dockets. In addition, the inferior courts of many states will become mere "deadwood" in the judicial system, and the states will be denied the right to gear their penal procedures and programs to modern philosophies of penology. Surely, these state interests taken in total do not violate the "unreasonable distinction" test of *Rinaldi, supra.* The state does have a legitimate, substantial and compelling interest in permtting the trial judge to impose the sentence he sees fit in light of any and all information which comes to him regarding the defendant,

whether that be a greater or lesser sentence. *Lex plus laudatur quando ratione probatur.*

Finally, the State of Utah can only emphasize the propriety of limiting the federal role in governing state criminal procedures because of the state's traditional discretion there. Mr. Justice Harlan said in *Spencer* v. *Texas*, 385 U. S. 554 (1967):

> "But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedures." 385 U. S. 564.

In addition,

> "It is the essence of our federalism that the States should have the widest latitude in the administration of their own system of criminal justice." *Hoag* v. *New Jersey*, 356 U. S. 464, 468 (1958).

Mr. Justice Black dissenting in part in *Jackson* v. *Denno*, 378 U. S. 368 (1964) also urged a measure of judicial self-restraint upon the Court.

> "My wide difference with the court is in its apparent holding that it has the constitutional power to change state trial procedures . . . [N]o constitutional provision gives this Court any such law-making power." 378 U. S. 407-408.

CONCLUSION

For the reasons stated above, the judgment should be reversed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General
State of Utah

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In The

Supreme Court of the United States

October Term, 1970

No. ~~1025~~ 70-77

STATE OF NORTH CAROLINA,
Petitioner

v.

WAYNE CLAUDE RICE,
Respondent

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BRIEF FOR PETITIONER, JOINED IN AND ADOPTED BY THE STATES OF ARIZONA, ARKANSAS, FLORIDA, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, TEXAS, UTAH, VIRGINIA.

ROBERT MORGAN
Attorney General of the State
of North Carolina

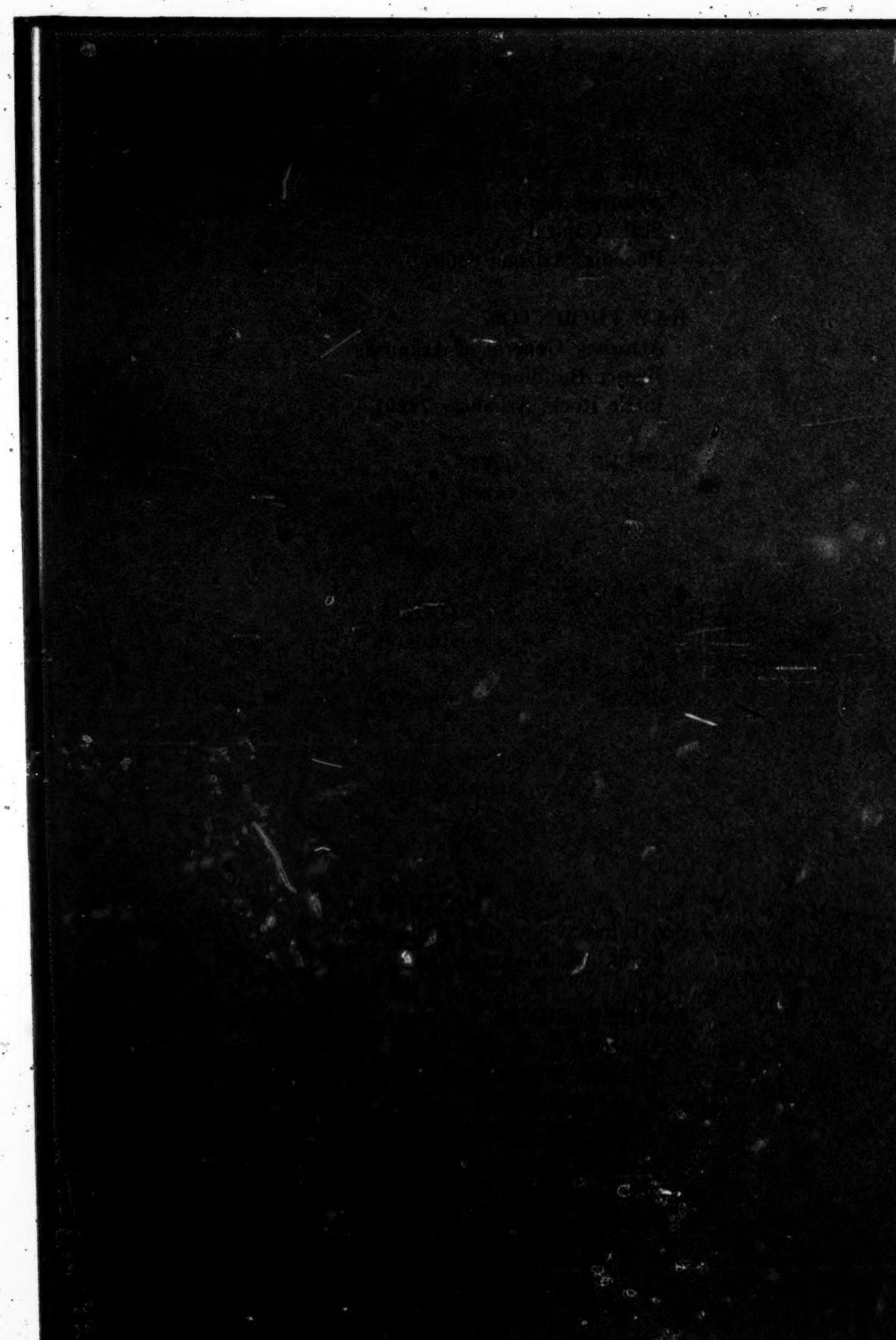
JACOB L. SAFRON
Assistant Attorney General

EDWARD L. EATMAN, JR.
Staff Attorney

Post Office Box 629
Justice Building
Raleigh, North Carolina 27602
Telephone: 829-7188

Attorneys For Petitioner

(The names of attorneys appearing for *amici curiae* are listed inside.)



GARY K. NELSON
Attorney General of Arizona
State Capital
Phoenix, Arizona 85007

RAY THORNTON
Attorney General of Arkansas
Justice Building
Little Rock, Arkansas 72201

ROBERT L. SHEVIN
Attorney General of Florida
The Capital
Tallahassee, Florida 32304

THEODORE L. SENDAK
Attorney General of Indiana
State House
Indianapolis, Indiana 46204

VERN MILLER
Attorney General of Kansas
State Capital Building
Topeka, Kansas 66612

JOHN B. BRECKINRIDGE
Attorney General of Kentucky
Frankfort, Kentucky

JAMES S. ERWIN
Attorney General of Maine
Augusta, Maine 04330

FRANCIS B. BURCH
Attorney General of Maryland
One Charles Center
Baltimore, Maryland 21201

A. F. SUMMER
Attorney General of Mississippi
Jackson, Mississippi 39205

ROBERT L. WOODAHL
Attorney General of Montana
Helena, Montana 59601

CLARENCE A. H. MEYER
Attorney General of Nebraska
Lincoln, Nebraska 68509

HELGI JOHANNESON
Attorney General of North Dakota
Bismarck, North Dakota 58501

CRAWFORD C. MARTIN
Attorney General of Texas
Austin, Texas 78711

VERNON B. ROMNEY
Attorney General of Utah
State Capital
Salt Lake City, Utah

ANDREW P. MILLER
Attorney General of Virginia
Supreme Court Building
Richmond, Virginia 23219

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In The

Supreme Court of the United States

October Term, 1970

No. 1325

STATE OF NORTH CAROLINA,
Petitioner

v.

WAYNE CLAUDE RICE,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER, JOINED IN AND ADOPTED BY THE STATES OF ARIZONA, ARKANSAS, FLORIDA, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, TEXAS, UTAH, VIRGINIA.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as WAYNE CLAUDE RICE v. STATE OF NORTH CAROLINA, 434 F. 2d 297 (4th Cir. 1970).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The Petition for a Writ of Certiorari was granted on April 5, 1971.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

DOES THE IMPOSITION OF A GREATER SENTENCE UPON JURY TRIAL AND CONVICTION WHEN THE ACCUSED EXERCISED HIS UNFETTERED AND ABSOLUTE RIGHT TO A TRIAL *DE NOVO* BEFORE A JURY IN THE SUPERIOR COURT, UPON "APPEAL" FROM A STATE DISTRICT COURT CONVICTION, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

(I) The Fourth Circuit Court of Appeals erred in equating an "appeal" from the State District Court to the State Superior Court with a defendant's "right of appeal" from a trial court to the appellate court: The Superior Court is not an appellate court for the District Court.

(II) The Fourth Circuit Court of Appeals opinion in RICE v. NORTH CAROLINA, 434 F. 2d 297 (4th Cir. 1970) raises serious problems affecting the structure of criminal justice in a significant number of states.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari by the State of North Carolina from a decision of the United States Court of Appeals for the Fourth Circuit granting Wayne Claude Rice habeas corpus relief and requiring the expunction of the record of his conviction. 28 U.S.C. § 2241, et seq.

Wayne Claude Rice was arrested on July 2, 1968, on a charge of driving under the influence of alcohol. He was tried in the General County Court of Buncombe County, North Carolina, on July 19, 1968, at which time he entered a plea of not guilty. He was found guilty and sentenced to a term of 9 months imprisonment suspended upon payment of a $100 fine and cost. Rice "appealed" the General County Court Judgment to the Superior Court of Buncombe County for trial *de novo* pursuant to North Carolina General Statutes §§ 15-177

and 15-177.1, now provided for in North Carolina General Statute 7A-290 in North Carolina's new District Court system:

> "In all cases of appeal to the Superior Court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and *de novo* by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon." N.C.G.S. 15-177.1.

> "Any defendant convicted in a District Court before the magistrate may appeal to the District Court for a trial *de novo* before the District Court Judge. Any defendant convicted in a District Court before the Judge may appeal to the Superior Court for trial *de novo*. . . ." N.C.G.S. 7A-290.

As a result of Rice's "appeal", the case was duly filed in the Superior Court of Buncombe County for trial *de novo*. On August 2, 1968, Rice was tried before a jury in the Buncombe County Superior Court, Honorable Francis O. Clarkson, Judge Presiding, found guilty of driving under the influence and sentenced to a term of two years. He did not appeal the conviction and sentence. On August 2, 1968, Rice was also tried in the Buncombe County Superior Court upon his "appeal" for trial *de novo* upon twelve charges of uttering worthless checks. He plead guilty and was sentenced by Judge Clarkson to 12 consecutive 30-day terms of imprisonment. (The sentences were concurrent with the sentence imposed for driving under the influence of alcohol.) Rice thereafter filed a Petition for Post Conviction Review on September 6, 1968, pursuant to the provisions of the North Carolina Post Conviction Hearing Act, N.C.G.S. 15-217, et seq. After a hearing, an Order was entered by the Honorable W. K. McLean, Judge Presiding, denying post conviction relief, and continuing the appointment of Dennis Winner, Esquire, court-appointed counsel, to petition the North Carolina Court of Appeals for a Writ of Certiorari to review Judge McLean's Order denying post con-

viction relief. On November 22, 1968, Rice withdrew his notice of appeal, and did not file a Petition for Writ of Certiorari to the North Carolina Court of Appeals until after the decision of the Federal District Court, *infra*. On November 25, 1968, Rice escaped from the custody of the North Carolina Department of Correction, and remained on escape until captured November 27, 1968. On December 6, 1968, Rice was convicted of escape in the Buncombe County General Court and sentenced to a term of 4 months to begin at the expiration of the sentences imposed upon conviction of driving under the influence of alcohol and uttering worthless checks. On December 11, 1968, Rice filed an Application for Writ of Habeas Corpus in the United States District Court for the Western District of North Carolina, which was denied by Memorandum and Opinion filed December 24, 1968, by Chief Judge Woodrow W. Jones of the United States District Court for the Western District of North Carolina, upon the ground that Rice had failed to exhaust his available State remedies and upon the further ground that the Application asserted no claim upon which relief could be granted. On January 6, 1969, Rice filed Notice of Appeal in the United States District Court for the Western District of North Carolina, and on December 8, 1969, a Certificate of Probable Cause was signed by John D. Butzner, Jr., Judge of the United States Court of Appeals for the Fourth Circuit. On December 10, 1969, Rice completed service of the sentence imposed for driving while under the influence of alcohol and commenced service of the sentence imposed for escape, which he completed on January 24, 1970, and was thereupon completely discharged by the North Carolina Department of Correction.

Upon Rice's appeal to the United States Court of Appeals for the Fourth Circuit, it was held that ". . . the District Court was in error in dismissing for Rice's failure to complete the remedies available to him in the State Court. It would have been futile , . . ," and stated "on the strength of PEARCE (NORTH CAROLINA v. PEARCE, 395 U. S. 711 (1969)),

we again see the more drastic sentence on the second trial as a denial of Federal due process." The Court concluded its opinion by stating that ". . . the Court is not insensitive to the logical and persuasive argument to the contrary in LEMIEUX v. ROBBINS, 414 F. 2d 353 (1 Cir. 1969), cert. denied 397 U. S. 1017 (1970). Likewise we express deference to the opinion in EVANS v. CITY OF RICHMOND, 210 Va. 403, 171 S.E. 2d 247 (1969). *We simply disagree.*" (Emphasis added.)

Concluding that the sentence imposed upon Rice upon trial *de novo* in the Buncombe County Superior Court was a denial of federal due process, the Fourth Circuit Court of Appeals directed that ". . . Rice is not to be held to his conviction. He was completely discharged by North Carolina on January 24, 1970, but this did not moot the case on habeas corpus. Injurious consequences because of the conviction might still obtain. *We think Rice is entitled to expunction of the record of them.*" (Emphasis added.) RICE v. NORTH CAROLINA, 434 F. 2d 297, 300 (4th Cir. 1970).

On February 8, 1971, the State of North Carolina filed a Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit and on April 5, 1971, certiorari was granted.

ARGUMENT

THE IMPOSITION OF A GREATER SENTENCE UPON JURY TRIAL AND CONVICTION WHEN THE ACCUSED EXERCISED HIS UNFETTERED AND ABSOLUTE RIGHT TO A TRIAL *DE NOVO* BEFORE A JURY IN THE SUPERIOR COURT, UPON "APPEAL" FROM A STATE DISTRICT COURT CONVICTION, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

I.

The Fourth Circuit Court of Appeals erred in equating an "appeal" from the State District Court to the State

> Superior Court with a defendant's "right of appeal" from a trial court to an appellate court. The Superior Court is not an appellate court for the District Court.

In reliance of what it conceived to be the principles established in NORTH CAROLINA v. PEARCE, 395 U. S. 711 (1969), the Fourth Circuit has here held that the imposition of a greater sentence upon the exercise of the unfettered right of trial *de novo* is a denial of Federal due process. The decision of the Fourth Circuit Court of Appeals in *RICE* is in direct conflict with the decision of the First Circuit Court of Appeals in LEMIEUX v. ROBBINS, supra. In deciding RICE, the Fourth Circuit stated "We simply disagree." While acknowledging the "logical and persuasive arguments to the contrary in LEMIEUX," the Fourth Circuit declined to follow the First Circuit's reasoning. The Fourth Circuit also disagreed with the opinion of the Supreme Court of Virginia in EVANS v. CITY OF RICHMOND, supra. In concluding that PEARCE was applicable, the Fourth Circuit also disagreed with the Supreme Court of North Carolina. STATE v. SPENCER, 276 N. C. 535, 173 S.E. 2d 765 (1970); STATE v. SPARROW, 276 N. C. 499, 173 S.E. 2d 897 (1970). The Fourth Circuit failed to cite the decision of the Supreme Court of Michigan to the contrary. MICHIGAN v. OLARY, 382 Mich. 559, 170 N.W. 2d 842 (1969). Moreover, the Supreme Court of Maine in LEMIEUX v. MAINE, 240 A. 2d 202 (Me. 1968) and the Supreme Court of Nebraska in STATE v. STANOSHECK, 186 Neb. 17, 180 N.W. 2d 226 (1970), are also contrary to the position taken by the Fourth Circuit in RICE.

The Fourth Circuit Court of Appeals erred in equating the Superior Courts of North Carolina with appellate courts to review the proceedings of the State District Courts. There was no review whatsoever of the proceeding in the General County Court of Buncombe County when Rice's "appeal" was heard in the Buncombe County Superior Court. The matter was *de novo*. In the event Rice wished to appeal from the convic-

tion and sentence in the Buncombe County Superior Court, he could have done so by appealing to the North Carolina Court of Appeals. N.C.G.S. 7A-27(b):

Pearce was tried and sentenced in a State Superior Court. His conviction was reversed on appeal after a successful attack on constitutional grounds and he was retried in the same Superior Court. Thus, he was clearly *retried* in a second court of record and of equal dignity with the court in which his first trial was held.

The language of this Court in PEARCE implies that the enunciated principle should be limited to the facts of that case. The problem before this Court concerned,

> "the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon *retrial*." 395 U.S. at 716.

Or, as otherwise stated,

> "what constitutional limitations there may be upon the general power of a judge to impose *upon reconviction* a longer prison sentence than the defendant originally received." 395 U.S. at 719.

The Court also refers to,

> "a man who is *retried* after his first conviction has been set aside . . . ." 395 U.S. at 722,

and condemns the practice of a trial court following,

> "an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside . . . (W)here the original conviction has been *set aside because of a constitutional error*. . . ." 395 U.S. at 724.

The RICE and PEARCE cases are readily distinguishable. Rice was tried *de novo* in the Buncombe County Superior

Court pursuant to N.C.G.S. §§ 15-177, 177.1, which under North Carolina's recently enacted District Court system, is provided for in N.C.G.S. 7A-290. Here, the inferior court conviction was not vacated by the Superior Court, nor did the Superior Court order a new trial; the Superior Court possesses no such authority. Nor was RICE required to attack or seek a reversal of his sentence in the General County Court, since trial *de novo* in the Superior Court is an absolute right even when the defendant pleads guilty in the lower court. STATE v. MEADOWS, 234 N.C. 657, 68 S.E. 2d 406 (1951); STATE v. BROOM, 269 N.C. 661, 153 S.E. 2d 384 (1967).

When an "appeal" is taken to the Superior Court, the case is, in the eyes of the State ". . . originally brought therein, . . . upon questions of law and fact, the judgment appealed from is completely annulled and *is not thereafter available for any purpose.*" STATE v. ANDERSON, 5 N.C. App. 614, 615, 196 S.E. 2d 38 (1969). See also STATE v. GOFF, 205 N.C. 545, 172 S.E. 407 (1934).

The type of case to which the PEARCE holding applies is obviously one which begins in the Superior Court, was appealed to an Appellate Court, and a new trial awarded *on a point of law*. The reversal and remand for a new trial usually involves the overruling of a trial judge on a point of law. In the present case, the "appeal" to the Superior Court for a jury trial *de novo* is a matter of right and does not involve reversal of the court below.

North Carolina District Courts do not provide for jury trials in criminal matters and transcripts are not available. *They are not courts of record.* The Superior Court tries the defendant *de novo* from the beginning to the end on both the law and the facts, without regard to the plea, trial, verdict or judgment in the District Court. To require a judge of the Superior Court to state new facts upon which his sentence was based imposes an impossible burden. There is no record from the court below and, therefore, there is no possible way a judge of the

Superior Court could review the evidence presented below. A requirement that the Superior Court judge state new facts upon which a greater sentence was based means that a Superior Court judge could never give a greater sentence after a jury trial *de novo* than that given by the District Court Judge sitting without a jury.

If such a theory controlled it would lead to ludicrous results and debilitate the machinery of criminal justice in North Carolina. If, as sometimes happens a defendant is found guilty of a misdemeanor and given only a warning, but decided he had been wronged in the lower court by a finding of guilt, he may appeal to the Superior Court as a matter of right. On his jury trial *de novo* in the Superior Court, the Superior Court judge would be forced to conduct a jury trial as to the issue of guilt alone. He would be bound by the lower court's warning and could not sentence the defendant when the facts of the case justified the imposition of a sentence. This example is not farfetched and would, in all probability, arise under the RICE decision.

In order to avoid such a result, there would be two alternatives. In the words of ALDRICH, C. J.:

> ". . . Either the district courts would tend to give maximum sentences out of caution, in the interest of the state, which, in turn, would have the effect of encouraging 'appeals,' or, if the district courts tended to give small sentences, the state would be led to avoid the vesting consequences by initiating cases in the Superior Court in the first instance. The state's two-step procedure has a legitimate purpose. We see no occasion for us to expose it to any such dilemma. Rather, we hold the defendant has no constitutional right to complain of a 'chilling effect' when, in effect, he need not stand in the draft in the first instance." LEMIEUX v. ROBBINS, supra, at 356.

The Superior Court tries the defendant *de novo* from the beginning to the end on both the law and the facts, without

regard to the plea, trial, verdict, or sentence in the District Court. Thus, the judge of the Superior Court is necessarily required to enter his own independent judgment, since the *de novo* trial in the Superior Court is without regard to the proceedings below. STATE v. MEADOWS, supra; STATE v. OVERBY, 4 N.C. App. 280, 166 S.E. 2d 461 (1969); DOSS v. NORTH CAROLINA, 252 F. Supp. 298 (M.D. N.C. 1966).

> ". . . Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to 'appeal' not only gives him a new trial but vacates the judgment and removes the entire case to the Superior Court . . . (S)hould he elect to take advantage of a second and fresh opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity." LEMIEUX v. ROBBINS, supra, at 355.

If trial judges are as devious as the Respondent would lead this Court to believe, it would be a simple matter for them to deny future defendants the very rights which PEARCE purports to protect. In every case in which appeal seemed likely, the inferior court could simply sentence the defendant to the maximum sentence allowed for the offense. PEARCE would then be inapplicable to the trial *de novo* in the Superior Court. Certainly, such a practice would not enure to the benefit of future defendants.

Chief Judge Aldridge summed up the position of the State of North Carolina when he stated:

> "Looking at the total circumstances, where the State offers the defendant a full trial, with full right of appeal therefrom, in the Superior Court, we do not think it unreasonable for it to restrict the appeal from the district court in the sense here complained of." LEMIEUX v. ROBBINS, supra, at 356.

Or, as even more succinctly stated by this Court:

". . . the slate has been wiped clean . . . ." NORTH CAROLINA v. PEARCE, supra, at 721.

II.

The Fourth Circuit Court of Appeals opinion in RICE v. NORTH CAROLINA, supra, raises serious problems affecting the structure of criminal justice in a significant number of states.

The system of dual levels of court in which the defendant charged with a less serious offense is initially tried in a lower court before a judge (in North Carolina this includes traffic offenses, disorderly person violations and misdemeanors), is also in effect in at least 24 other states, and possibly more than presently revealed in our research.[1] If the Fourth Circuit's opinion in Rice stands, North Carolina, together with Arizona, Arkansas, Colorado, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Texas, Utah, Virginia, Washington and West Virginia, will all be required to revise their judicial systems. It holds the promise of converting lower criminal trial courts, which now handle misdemeanor and other offenses within their

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1. ARIZONA—A.R.S. § 22-374; ARKANSAS—Ark. Stat. §§ 44-501, 502 and 509; COLORADO—Rule 37(f) COLO. Rules of Crim. Pro.; FLORIDA—Constitution of Florida, Art. V, §§ 11(2) and 6(3). See also F.S.A. §§§ 932.53, 54, 55 and 56; INDIANA—Burns' Ind. Stat. Ann. § 9-721. See also PEELE v. STATE, 161 Ind. 378, 68 N.E. 682, and HARLAN v. STATE, 190 Ind. 332, 130 N.E. 413; KANSAS—K.S.A. § 22-3610. See also STATE v. COULTER, 40 Kan. 87, 19 P. 368 (1888), and STATE v. FORNER, 32 Kan. 281, 4 P. 357 (1884); KENTUCKY—K.R.S. § 23.032 and Rule 12.06 Ky. Rules of Crim. Pro. See also DRESSMAN v. COMMONWEALTH, 204 Ky. 668, 265 S.W. 3 (1924); MAINE—Me. Rules of Crim. Pro., Dist. Ct. Rules 37(a) and 39(a), (b) and (c). See also LEMIEUX v. MAINE, 240 A. 2d 206 (Me. 1968) and LEMIEUX v. ROBBINS, 414 F. 2d 353 (1st Cir. 1969), cert. dnd. 397 U.S. 1017 (1970); MARYLAND—Baltimore City Municipal Code (Arts. 5 § 43, Ann. Code of Md., Vol. I, 1968 Replacement Vol.) and Art. 52 § 13(b), Ann. Code of Md., Vol. 5, 1968 Replacement Vol. See also Art. 26 § 156, Ann. Code of Md. Vol. 2, 1966 Replacement Vol., 1970 Cumm. Supp.; MICHIGAN—PEOPLE v. OLARY, 382 Mich. 559, 170 N.W. 2d 842 (1969); MINNESOTA—M.S.A. § 488.20 and §§§ 633.20, 21 and 22; MISSISSIPPI—Miss. Code §§ 1201 and 1202; MISSOURI—Supreme Court Rule 22 §§ 10 and 11; MONTANA—

jurisdiction, thereby alleviating court congestion,[2] into mere stepping stones to the superior court for criminal defendants charged with misdemeanor and other inferior offenses.

R.C.M. § 95-2009. See also WHITE SULPHUR SPRINGS v. VOISE, 136 Mont. 1, 343 P. 2d 855 (1959); NEVADA—Rule 76 Justices' Court Pro.; NEW HAMPSHIRE—STATE v. DESPRES, 107 N.H. 297, 220 A. 2d 758 (1966). See also N.H.R.S.A. §§§ 502.18, 502A:11 and 12, and 599:1; NEW MEXICO—N.M.S.A. §§6-15-3(a); NORTH DAKOTA—N.D. Cent. Code §§ 33-12-40 and 41; TEXAS—Vernon's Ann. Code of Crim. Pro. §§ 44.17 and 45.10; UTAH—Utah Code Ann. §§ 78-4-17 and 78-5-14. See also Utah Code Ann. §§ 77-57-43 and 77-27-2; VIRGINIA—Va. Code § 16.1-136. See also EVANS v. CITY OF RICHMOND, 210 Va. 403, 171 S.E. 2d 247 (1969); WASHINGTON—R.C.W. §§ 3.50.280 and 3.50.410. See also STATE v. HAGIMORI, 57 Wash. 623, 107 P. 855 (1910); WEST VIRGINIA—Constitution of W. Va., Article VII, § 28. See also W. Va. Code §§ 50-18-1 and 50-18-10 STATE v. KESSINGER, 144 W. Va. 209, 107 S.E. 2d 367 (1959).

2. For example, according to data supplied by the Administrative Office of the Courts of the State of North Carolina*, for the 1970 calendar year, the Superior Courts of 83 of the 100 counties of the State of North Carolina tried 29,159 criminal cases, of which 16,751 were trials *de novo* from the District Courts. In other words, 57.4% of all criminal trials in the Superior Courts of North Carolina were upon trial *de novo*.

During 1970, the District Courts of the 83 counties in which the new District Court system had already been implemented, tried 342,327 cases, of which 16,751 were "appealed" for trial *de novo* in the Superior Court. (The figure of 342,327 includes only cases which were actually tried; and excludes cases disposed of by waiver, preliminary hearing, nol pros, or otherwise.) Of the cases tried in the District Courts, 4.89% were "appealed" to the Superior Court for trial *de novo*.

Using the 1970 statistics as an indicator, it is possible to project the impact upon the Superior Court of any increase in the number of cases "appealed" from the District Court for trial *de novo*. An increase of 1% in the number of cases "appealed" from the District Court would add 3,423 cases to the Superior Court criminal docket. An addition of 3,423 cases constitutes an increase of 12% in the Superior Court docket. The ratio between an increase in cases "appealed" from the District Court and the consequent increase in the Superior Court criminal docket is 1 to 12. If cases "appealed" from the District Court increased by 5%, the case load of the Superior Court would increase by 60%; *if cases appealed from the District Court increased by 10%, the case load of the Superior Court would increase by 120%.*

*This data is taken from the annual report of the Administrative Office of the Courts, 1970, and from reports submitted to the Administrative Office by the Clerks of Superior Court. These statistics relate to the 1970 calendar year and cover only the 83 counties of the State then under the District Court system. On December 7, 1970, the remaining 17 of the State's 100 counties came under the new District Court system.

Defendants will have everything to gain if with no added exposure they congest already crowded Superior Court criminal dockets and frustrate all efforts to implement the constitutional mandate of speedy trial in the criminal trial courts.

It is logical to anticipate and should be presumed, that upon jury trials *de novo* in the Superior Court more evidence is presented than was presented in the lower court. Jury trials in the Superior Court tend to result in better preparation, more evidence, more witnesses, and more extensive cross-examination, than do trials in the inferior court. If the judge of the Superior Court cannot impose a greater sentence when such a sentence is demanded by the facts and, is within the range of punishment prescribed for the offense, all defendants would "appeal" to the Superior Court in order to obtain a second opportunity for determination of guilt or innocence. This automatic two-step trial procedure would result in the District Court system serving no useful purpose and totally frustrating the intent of its creation, i.e., that of alleviating court congestion. If the slate is wiped clean, then the State and the defendant should start at parity.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals in the application of the PEARCE doctrine in this case extends well beyond the intent of this Court. It is clear that this Court's holding in PEARCE did not invision the factual situation of the case at bar. This matter is governed by a statutory procedure and is not the type of "new trial" to which the holding in PEARCE applies.

For the foregoing reasons, we respectfully submit that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ROBERT MORGAN
Attorney General

JACOB L. SAFRON
Assistant Attorney General

EDWARD L. EATMAN, JR.
Staff Attorney

P. O. Box 629
Justice Building
Raleigh, North Carolina 27602

Telephone 829-7188

COUNSEL FOR PETITIONER

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NORTH CAROLINA,

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—v.—

WAYNE RICE,

Respondent

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit.

BRIEF FOR RESPONDENT

WILLIAM W. VAN ALSTYNE

Counsel Assigned by the
Court of Appeals
Duke University Law School
Durham, North Carolina 27706

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Jurisdiction 1

Question Presented

Did the court below correctly conclude that a state denied due process of law when it imposed an unexplained harsher sentence upon a defendant following retrial for the same offense from which he appealed his conviction pursuant to the only avenue of review which the state affords, namely, appeal for retrial de novo? 2

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NORTH CAROLINA,

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Respondent

On Certiorari From The United States Court of Appeals For The Fourth Circuit.

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 434 F.2d 297 (1970).

Jurisdiction

Jurisdictional requirements arising under 28 U.S.C. § 1254(1) are satisfied in that review of this civil case was granted on April 5, 1970, following petition of one of the parties for a writ of certiorari after rendition of judgment by the court of appeals.

Question Presented

Did the court below correctly conclude that a state denies due process of law when it imposes an unexplained harsher sentence upon a defendant following retrial for the same offense from which he appealed his conviction pursuant to the only avenue of review which the state affords, namely, appeal for retrial de novo?

Statement of the Case

On July 19, 1968, Mr. Wayne Rice was tried in the General County Court of Buncombe County, North Carolina, upon his plea of not guilty to a charge of driving while intoxicated. Although the alleged offense was subject to punishment by two years in prison (see N.C.G.S. §§ 20-138, 20-179 [since amended]), the offense was nonetheless described as a mere "misdemeanor" under North Carolina law. (See *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 [1965]). Accordingly, under North Carolina law exclusive original trial jurisdiction rested solely with the General County Court,[1] *i.e.*, Mr. Rice had no election to be tried in a Superior Court and was compelled by law to submit to the jurisdiction of the General County Court in the first instance.

As acknowledged in Petitioner's Brief (p. 8), a defendant subjected to trial in a General County Court has no right to trial by jury nor does that Court make any record of the trial proceedings respecting the voluntariness of pleas, admissibility of evidence, or any other matter. Additionally, the State makes no provision for court assignment of counsel to represent indigent defendants in this court nor does it require that the judge, elected from the county, possess any legal training or experience whatever.[2] Thus,

[1] N.C.G.S. § 7-728: "The general county court shall have exclusive original jurisdiction of all * * * criminal offenses committed in the county below the grade of a felony as now defined by law. . . ."

[2] The subconstitutional character of the general county court is reviewed and discussed in Roy W. Davis, "Courts Commission: A Report on the Courts and the Court Business of the 28th Judicial District," *Studies for the Court Commission*, vol. 2, no. 83 (Nov. 1964). See also Fred G. Crumpler, "Com-

although Wayne Rice was charged with an offense punishable by two years in prison—an offense which by federal standards is a felony and by any standards is well above the level of petty offense—he was compelled to stand trial before a subconstitutional court lacking the essential rudiments of due process solely as a consequence of the state's determination to try him there without choice of his own.

Found guilty by the judge of the General County Court, Wayne Rice was sentenced to nine months in prison suspended upon payment of a $100 fine plus costs. This was Mr. Rice's first conviction for driving while intoxicated. Shortly following his conviction, "exercising the *only* avenue afforded to review his conviction,"[3] Mr. Rice appealed to the Buncombe County Superior Court. Two weeks later, on August 2, 1968, he was tried again in that Court and again found guilty, albeit in this instance the determination was made by a jury and Mr. Rice was represented by court-appointed counsel. The presiding judge of the Superior Court then proceeded to impose upon Mr. Rice an active sentence of two years in prison—the maximum allowed by law.

The judge's reasons for imposing this remarkably harsher sentence nowhere appear in the record. Rather, "the record reveals nothing which warrants the increased punishment."[4] All that appears is that as a result of exercising his sole statutory right to appeal, that providing for trial de novo with sentence to be imposed by the court, Wayne Rice found himself sentenced to two years in prison

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ments from Judicial Officials, a Report to the Committee on Improving and Expediting the Administration of Justice in North Carolina of the North Carolina Bar Association," *Studies for the Court Study Committee* 1956-1958, vol. I, 22:

> It was of interest to note that two of the lower court judges did not know what rules of procedure applied in their court.
>
> • • •
>
> One judge whose answer is in accord with the majority replied: "No, I do not think that jury trials would improve the lower courts as in cases with attorneys and with a jury most of the defendants would be found not guilty."

[3] *Rice v. North Carolina*, 434 F.2d at 299. (Emphasis added.) The operative state statute applicable to such an appeal was N.C.G.S. § 15-177.1.

[4] *Rice v. North Carolina*, 434 F.2d at 300.

whereas, had he been willing to forego his only access for review of any kind of his original conviction, he would have had to pay a $100 fine plus costs. Reviewing this case in light of the Supreme Court's decision in *North Carolina v. Pearce*, 395 U.S. 711 (1969), the United States Court of Appeals for the Fourth Judicial Circuit observed:

> [W]e see again the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.
>
> *Rice v. North Carolina*, 434 F.2d at 300.

Concluding that injurious consequences might well inhere in the uncorrected record of this harsher sentence which the Court of Appeals held to constitute a violation of due process, it ordered that the record be expunged. Thereafter, the State filed timely petition for a writ of certiorari which this Court granted on April 5, 1971.

In brief, the case reflects the following factual and generic circumstances for determining the proper application of this Court's decision in *North Carolina v. Pearce*:

a) The court before which the defendant was first placed in jeopardy was not a court whose jurisdiction was confined to the disposition of petty offenses or minor misdemeanors; it was, rather, a court of primary criminal jurisdiction over all offenses subject to punishment by as long as two years in prison.

b) The accused makes no choice whatever to be tried in this court rather than in some other. The accused is not permitted by law to bypass this court, he makes no election whatever as to whether he might instead be tried in a court of due process, and he is wholly without recourse to any other court until after being sentenced by this court.

c) Within this General County Court, the accused is subjected to trial without benefit of a jury; there are no transcribed proceedings respecting the voluntariness of pleas or circumstances respecting the admissibility of evidence; though he may be indigent there is no provision for appointment of counsel; the presiding judge need have no training or experience in the law; and all that is recorded is the charge, the plea, the finding of guilt, and the sentence.

d) The sole recourse of the accused from any conviction found or sentence imposed by this court is exclusively by way of appeal

for retrial de novo in a Superior Court; by no other means does the state afford any review of the consequences of his conviction.

e) Sentence subsequently imposed in the event the accused pursues his only recourse for review and correction of his original conviction may be freely extended to its statutory maximum in the sole decision of the judge of the court in which that appeal is taken, *i.e.*, the jury is not involved.

f) No reason whatever is required to be given or recorded in explanation of an extended sentence thus imposed with the consequence that the harsher sentence is itself functionally immune from meaningful constitutional review.

Argument

I. *The Decision Below Is Correct and Controlled by this Court's Decision in North Carolina v. Pearce.*

The imposition upon Rice of a harsher sentence after retrial for the same offense was a clear violation of due process principles confirmed by this Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969). The issue presented in *Pearce*, as stated by this Court, is exactly the same as the issue identically resolved by the court below in this case:

> When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?
>
> 395 U.S. 711, 713.

In answer to that question, this Court declared:

> [S]ince the fear of . . . vindictiveness may constitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, Due process . . . requires that a defendant be freed of apprehension of such a retaliatory motivation.
>
> 395 U.S. 711, 725.

It warrants emphasis that the Court was explicitly concerned with the discouraging effects of the accused's reasonable fears and apprehensions of retaliatory harsher sentencing upon his statutory right of appeal, and not with the rare instance where the fact of retaliatory sentencing is betrayed on the face of the record. (Cf. the separate Opinion by Mr. Justice Black, 395 U.S. at 739-40. See *United*

States v. Wiley, 278 F.2d 500. [7th Cir.]). Indeed, the Court specifically footnoted in Pearce a poignant instance that such fear of vindictive harsher sentencing had played in throttling the right to appeal (395 U.S. 725 at note 20), and it acknowledged the evidence of frequent increased sentences in North Carolina itself as providing ground for an appellant's anxiety. See also Aplin, *Sentence Increases on Retrial after North Carolina v. Pearce*, 39 U. Cin. Law Rev. 427 (1970). Accordingly, this Court held in *Pearce* that:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.
>
> 395 U.S. 711, 726.

The State in this case failed to produce any record whatever in explanation of the doubly severe harsher sentence imposed upon the Respondent by the judge who sentenced him following retrial. There is, of course, nothing whatever in the Superior Court record to provide the slightest basis for any inference that the escalated punishment could possibly have been founded on "objective information concerning identifiable conduct" on Mr. Rice's part during the brief two-week interval between the first and second sentences. Accordingly, the court below readily concluded that the harsher sentence was imposed in violation of the Due Process Clause of the Fourteenth Amendment.

Indeed, for the Fourth Circuit Court of Appeals to have done otherwise would not only have been to recede from *Pearce*, which the fourth circuit had itself decided and which it had anticipated in *Patton v. North Carolina*, 381 F.2d 636 (1967), *cert. denied*, 390 U.S. 905 (1968), it would have invited an extraordinarily ironic wholesale circumvention of *Pearce* by the several states within its jurisdiction: to limit *Pearce* short of the right of appeal for retrial

de novo of criminal charges punishable by *substantial* prison terms would have explicitly encouraged each state to undermine the fourteenth amendment by processing serious criminal charges in subconstitutional courts while limiting access to corrective processes to those defendants with sufficient fortitude to brave the risk of unexaminable harsher sentences on appeal for retrial de novo.

Respectfully, this is in fact the question now before this Court as well: either to affirm the decision below or to recede from *Pearce*, and thereby to provide an encouragement for other states to commit the trial of non-petty criminal charges to stripped-down, subconstitutional courts lacking the rudiments of due process, while systematically discouraging appeals through the implicit threat of essentially unreviewable, retaliatory harsher sentencing associated with the accused's sole avenue of appeal—an appeal for retrial de novo.

It is significant to note in this respect that as his predecessor declined to join in Florida's plea that Minnesota associate itself with Florida's position in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Attorney General of Minnesota has similarly declined to embrace North Carolina's position in this case as well.[5] Noting first that harsher sentencing following any trial de novo has been abandoned as a matter of judicial policy in Minnesota's largest metropolitan county since 1968, and that "the statistics for 1970 . . . reflect that no flood of appeals has occurred," the Minnesota Attorney General replied to the North Carolina Attorney General in response to the latter's solicitation for a brief amicus curiae:

> I also have some doubt as to the propriety of using the sentencing process to effect improvements in the court calendar.
>
> . . .
>
> And in those cases where the de novo jury trial must be provided as a matter of constitutional mandate, deterring appeals by use of heavier sentences would seem to run afoul of *North Carolina v. Pearce*, 395 U.S. 711 (1969).

[5] The Attorney General's letter to the North Carolina Attorney General is reproduced in full at p. 20 of this Brief.

. . .

Because of the doubts I have expressed, and because our statistics do not provide support for your position, it does not appear that we will be able to join it.

Very truly yours,
WARREN SPANNAUS
Attorney General

Identically, and again as a matter of judicial policy, the Supreme Court of New Jersey has moved to forbid harsher sentencing following appeal from state municipal courts for retrial de novo:

> [W]e are satisfied that as a matter of policy and apart from constitutional compulsion, a defendant who appeals from a municipal court should not risk a greater sentence. In reaching that conclusion, we are mindful of the reason for a trial de novo in these matters. The Legislature long ago provided for a retrial at the county level because of the weakness inherent in the system of local courts whose judges were locally appointed, served part-time, and frequently were not even members of the Bar. * * * Although the municipal court of today is much improved over its ancestors, the structure remains unsound. * * * We intend no reflection upon the many judges of the municipal courts who work hard and conscientiously notwithstanding the shortcomings of the system itself. *Rather we recognize that, so long as this system endures, the need remains to afford the litigant, frequently a stranger to the locality, the opportunity to seek a redetermination by a court at a higher level without the risk of a larger penalty.*
>
> *De Bonis v. State*, 9 Crim. Law Rptr. 2109 (1971) (New Jersey Supreme Ct., April 8, 1971)

Having no similar power in this case directly to revise the policy of the North Carolina Supreme Court which has adamantly declined to restrict harsher sentencing following appeals for retrial de novo in North Carolina (*State v. Spencer*, 276 N.C. 335, 173 S.E.2d 765 [1970]; *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 [1970]), the Fourth Circuit Court of Appeals correctly concluded that the command of the fourteenth amendment itself must still control:

> On the strength of *Pearce*, we again see the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.
>
> 434 F.2d at 300.

The *a fortiori* application of *Pearce* to *Rice* had already been anticipated in *Torrance v. Henry*, 304 F. Supp. 725 (E.D.N.C. 1969). Like *Rice*, *Torrance* arose on petition for a writ of habeas corpus in behalf of a North Carolina prisoner who, after being convicted in an inferior court and appealing to the Superior Court, was tried de novo, convicted again of the same offense, and given a heavier sentence than had been imposed by the inferior court. In his opinion, Chief Judge Butler observed:

> Applying the reasoning underlying *Pearce*, we perceive no material distinction between a case where the defendant's original conviction has been set aside, whether by appeal or collateral proceedings, and a new trial ordered, and a case where the defendant has appealed his original conviction, and received a trial *de novo*. In either case a harsher sentence at retrial is a violation of due process, unless justified by the subsequent events requirement as enunciated in *Pearce*.
>
> 304 F. Supp. 725, 726.

Similarly, the application of *Pearce* to all appeals for retrial de novo has been applied by state court decision in Maryland, *Cherry v. Maryland*, No. 244 (Md. Ct. of Spec. App., May 6, 1970), and, apart from the parallel state court decisions already noted from New Jersey and Minnesota, even that minority of states which retain the basic arrangement of appeals for retrial de novo find no uniform need for the retention of this *in terrorem* device. For instance, the applicable provision in New Mexico flatly forbids an increase in sentence for any reason whatever:

> *New Mex. Rev. Stat. Ann. 36-15-3:* Appeals—District court proceedings. —A. Appeals from the magistrate court shall be determined by trial de novo in the district court, and all laws, rules and regulations governing the magistrate court shall govern the trial in the district court.
>
> • • •

> B. (2) in a criminal action, the district court *shall enter judgment imposing the same or a lesser penalty as that imposed in the magistrate court in the action.*
>
> (Emphasis added.)

In other jurisdictions, such as Washington, the possibility of an extended sentence following appeal and retrial de novo is significantly restricted to a maximum penalty associated only with *petty* offenses:

> *Rev. Code Wash. Ann. 3.50.410:* Superior court trial de novo—Jury trial—Maximum punishment—Appeal to supreme court.
>
> In the superior court the trial shall be de novo. * * * If the defendant be convicted in the superior court, he shall be sentenced anew by the superior court judge with a fine of *not to exceed five hundred dollars or imprisonment in the city jail not to exceed ninety days,* or by both such fine and imprisonment. Appeals shall lie to the supreme court of the state of Washington as in other criminal cases in the superior court.
>
> (Emphasis added.)

Contrary to North Carolina's argument in this case, therefore, the great majority of state practices will be wholly unaffected by affirmance of the decision below. The majority of states do not utilize appeals for retrial de novo at all and are otherwise already bound by *Pearce* itself. Of the minority of states that do utilize appeals for retrial de novo, several have already moved as a matter of judicial policy to forbid the imposition of harsher sentence upon retrial, the legislature of another has forbidden the practice by statute, and in still other states the possibility of a harsher sentence is distinguishably limited to sentences following retrials of purely petty offenses.

North Carolina nonetheless contends that *Pearce* ought not be followed in this case, in large part from its concern that more appeals might then be taken from the judgments of its subconstitutional courts than are currently carried forward by the smaller number of defendants now willing to risk the peril of an unexaminable heavier sentence. (See Petitioner's Brief at p. 12.) One sufficient answer to this argument is simply to emphasize again the unsupported

and wholly conjectural nature of its claim, the *fact* that there is no evidence of any such tide of appeals where harsher sentencing recently has been prohibited elsewhere (*e.g.*, Minnesota since 1968, New Mexico since 1968), and the fact that the vast majority of states do not use subconstitutional courts at all for the trial of criminal cases above the level of petty offenses. So draconian an economy has evidently seemed neither necessary nor appropriate to any of the great majority of states in spite of the common and very real problem of congestion in their courts.

A second and related observation is the remembrance that the fourteenth amendment does not succumb to the inconveniences of compliance. To paraphrase Mr. Justice Brandeis, the guarantee of due process exists "not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (dissenting Opinion). It is unquestionable that we are here concerned with *arbitrary* power, moreover, since the *Pearce* rule limits the authority to impose harsher sentences specifically by a standard which, when observed, only then makes it possible subsequently to determine whether the harsher sentence was improperly motivated:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, *so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.*
>
> *Pearce* at 726. (Emphasis added.)

A rule more permissive than *Pearce* by any degree would necessarily undermine its concern for due process by providing latitude for arbitrary harsher sentences beyond discovery by subsequent review, and correspondingly discouraging the accused in the exercise of his statutory right of appeal. This specific function of the explicitness of the

Pearce rule to curtail the risk of *arbitrary* power in the use of the sentencing power so far as it affects rights of appeal has been acknowledged again, more recently:

> [D]ue process forbids the States from adopting procedures that would defeat the institution of federal judicial review. * * * [D]ue process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected. * * * If there is any way in which these propositions must be qualified, it is only that in some circumstances the impossibility of certain procedures may be sufficient to permit state power to be exercised notwithstanding their absence.
>
> * * *
>
> Even if it be assumed that juries are incapable of making such explanations, we have already held that such inability does not excuse the State from providing a sentencing process that provides reasons for the decisions reached if those reasons are otherwise required. *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969).
>
> *McGautha v. California*, 39 U.S. LAW WEEK 4529, 4549, 4554 (1971) (dissenting Opinion)

Thus, when the state commits exclusive original trial jurisdiction of offenses punishable by two years in prison to a subconstitutional court, with access to review limited solely to appeal for retrial de novo and sentence imposed by the judge, there can be no doubt either of the feasibility or the necessity of applying the *Pearce* rule as a limitation to avoid the risk and the discouraging effects of the risk of arbitrary harsher sentencing.

Finally, it is respectfully submitted that to the very extent that North Carolina means what it has declared in its Brief—that the maintenance of a system imposing the unrestricted risk of harsher sentencing upon all those taking an appeal for retrial de novo is essential to its judicial order precisely *because* it discourages appeals (and not in spite of the implicit tendency of such a system so to discourage appeals)—the State in essence is claiming a prerogative to entertain precisely that policy which the Court has already declared to be prohibited by the Constitution:

> A court is "without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."
>
> *Pearce* at 724.

To the extent that appeals for retrial de novo previously may not have been taken from the subconstitutional courts of North Carolina solely from anxiety of the accused that a functionally unreviewable harsher sentence might subsequently have been imposed, the indiscriminate discouragement of those appeals which discouragement the State now seeks to advance as its principal argument to this Court is precisely the appalling condition which the explicit holding in *Pearce* was surely meant to end.

Indeed, the case now before the Court is distinguishable from *Pearce* only to the extent that it is more aggravated than *Pearce*. There can be no question that "apprehension of a retaliatory motive" (*Id.* at 725) respecting sentencing after retrial de novo must as readily discourage County Court defendants from seeking relief on appeal as in the case of those originally tried in the Superior Court. But though the degree of apprehension must be at least as great in the one case as in the other, the average defendant's predicament in the case of one first convicted and sentenced in a General County Court is doubtless more often genuine than in the case of one first convicted and sentenced in a Superior Court: the less professional and less circumspect operation of the General County Court is itself much more conducive to the probability of serious error in the proceedings of that Court than is likely in a Superior Court. As a consequence, the uniform degree of discouragement to appeal applicable to both cases must tend in fact to yield a greater proportion of unfairness to those subjected to trial in the subconstitutional conditions of the General County Court, than in the circumstances of the *Pearce* case itself.

Indeed, were the larger issue otherwise appropriately before this Court, Respondent would not hesitate to suggest

that the use of subconstitutional courts with exclusive original jurisdiction over anything more substantial than purely petty offenses is itself a practice violative of due process, by no means adequately redeemed simply by permitting the accused *thereafter* to appeal for a fundamentally fair trial as a matter of right. But in any case, for the State additionally to hobble the statutory right of the accused to appeal from such a predicament with the further discouragement of subjecting him to the risk of an essentially unreviewable harsher sentence should he be so bold as to exercise that right, is clearly intolerable. On principle and from every fair factual comparison with the less alarming situation in *Pearce* itself, it is clear that the decision of the Fourth Circuit Court of Appeals in this case can only be affirmed.

In reaching this conclusion as Respondent respectfully submits it must, this Court need not be indifferent to several concerns otherwise appropriately reflected in Petitioner's Brief (and partly shared by the amicus briefs of Maine and Utah). First, this Court may, as it deems appropriate, limit its decision to cases such as this one in which offenses punishable *by more than six months in prison* are originally subject to trial solely in courts in which essential due process safeguards are not provided (*e.g.*, courts without trial transcripts recording the voluntariness of pleas, admissibility of evidence, etc.; courts in which trial by jury is denied; courts unauthorized to appoint counsel in behalf of unrepresented indigents). Accordingly, any state so desiring would remain at liberty still to utilize a dual trial court system with respect to purely *petty* offenses, free from concern that the *Pearce* restriction limiting harsher sentencing upon retrial de novo might otherwise lead to a substantial increase in appeals by relieving even petty offenders of their anxiety of retaliatory harsher sentences. Such a distinction finds some support in other decisions of this Court and yet keeps at least minimum faith with *Pearce*. (Compare *Gideon v. Wainwright*, 372 U.S. 335 [1963] and *Patterson v. Warden*, 372 U.S. 776 [1963] with *Winters v. Beck*, 239 Ark. 1151, 397 S.W.2d 364 [1966],

cert. denied, 385 U.S. 907 (1966) and *DeJoseph v. Connecticut*, 3 Conn. Cir. 624, 222 A.2d 752, 771 (1966), *cert. denied*, 389 U.S. 902 (1967). See also *Baldwin v. New York*, 399 U.S. 66 [1970] ["no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for *more* than six months is authorized."]) (Emphasis added.)

Second, assuming—as Respondent respectfully believes is more in keeping with *Pearce* (and as the Supreme Court of New Jersey has otherwise found essential and as New Mexico provides by statute)—that the constitutional limitation on harsher sentencing applies irrespective of the nature of the offense first required to be submitted to trial in an inferior court with sole access for review restricted to an appeal with retrial de novo, this Court may nonetheless take pains to correct the mistaken impression of North Carolina that such an application of *Pearce* would either force its inferior courts to make full trial records or, alternatively, preclude a Superior Court from ever increasing the sentence following trial de novo. See Petitioner's Brief at pp. 8-9.) It need only be pointed out that under *Pearce*, the presence or absence of a trial transcript from the first trial is utterly irrelevant as to whether a subsequent judge may impose a harsher sentence. Rather, a harsher sentence may be imposed only if

> based upon objective information concerning identifiable conduct on the part of the defendant occurring *after* the time of the original sentencing proceeding.
>
> *Pearce* at 725. (Emphasis added.)

As a consequence, no point would be served in this regard were the State to add to the expense of operating its subconstitutional courts by now providing for a full record of the trial, nor would any advantage thereby be gained so far as the latitude of subsequent harsher sentencing is concerned. (Correspondingly, it is also clear that application of the *Pearce* rule to sentences followed by appeal for retrial de novo would not in the least induce any change of practice among states providing for no full record of the

original trial, *i.e.*, the "cost" of applying *Pearce* to retrials de novo is simply not as great as the alleged concern of Petitioner would otherwise imply.)

Third, the Court may appropriately point out that the state is free in the alternative simply to upgrade its inferior courts with jurisdiction above the level of petty offenses, so to provide a full transcript of all proceedings therein, and then to restrict the defendant to right of appeal on alleged errors of law alone. By such an adjustment, the state may wholly dispel its concern that the present statutory right to retrial de novo may unnecessarily invite appeals in cases where there may in fact have been no error.

Finally, the Court could find that it is only in cases where the accused has no choice respecting the character of state court in which he is first submitted to trial that *Pearce* must necessarily apply to protect him from fear of an unexaminable harsher sentence following an appeal and retrial de novo. Were the defendant given a choice in the first place, and were he freely to exercise it to elect the informality of a subconstitutional court with absolute right to appeal for retrial de novo in the more formal court in which he could have chosen to be tried originally, then it may indeed be reasonable to treat the case as though the "slate has truly been wiped clean" and to proceed upon retrial without reference to whatever sentence may have been imposed by the inferior court. The obvious reasons for this suggested distinction are twofold. First, as the defendant may originally forbear from requesting trial in the superior court principally in hope of more lenient treatment under the informal auspices of the inferior court, it may not be unjust that should he subsequently appeal to the superior court he should submit to its judgment on the same footing as another originally electing to be tried there. Second, to the extent that the superior court judges are understood to have an interest in maintaining the usefulness of inferior courts as courts of first instance, there is markedly less reason for a defendant to fear that his willingness to be tried in such a court so long as it is buttressed with a right to appeal for retrial de novo should he feel himself to have been unjustly convicted or sentenced, will be discouraged through

the use of unexaminable harsher sentences on appeal. In this respect, *i.e.*, cases arising in any jurisdiction providing an election to the defendant for trial in the superior court or trial in a subconstitutional court with right of appeal for retrial de novo in the superior court, there is indeed neither reason for the defendant to fear that the superior courts will be motivated by improper considerations nor reason to discourage whatever judicial economy the state may feel is to be derived from such an arrangement.

North Carolina does not, of course, provide for any such election by the accused nor did it do so for Wayne Rice. Rather, it forces an accused through trial and sentence in a subconstitutional court intrinsically prone to error, thereafter intimidating him by an exclusive de novo system which he knows to contain a built-in emphasis on the discouragement of any appeal from the subconstitutional court. This system is one which advises him that his only recourse is by way of appeal for retrial de novo subject to the power of the presiding judge to levy upon him an even harsher sentence functionally immune from further examination. The depressing impairment of fourteenth amendment rights under this system is an extreme and indefensible condition operating to deprive the accused of his liberty without due process of law. The Fourth Circuit Court of Appeals properly held it to be so, correctly relying upon this Court's decision in *Pearce*. The decision of that court should be affirmed, observing at the same time that the decision takes away nothing whatever from the state's capacity to reconcile fairness with efficiency in the administration of its laws.

II. *The Restriction of Respondent's Constitutional Right to Trial by Jury Denied Him Due Process of Law.*

It is well established by settled decisions of this Court that Wayne Rice, having been charged with an offense punishable by more than one year in prison, had an absolute right to trial by jury. *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968). He was clearly denied that right in that he was compelled to sub-

mit to trial upon his plea of not guilty without right to have his guilt or innocence determined by a jury. The state correctly concedes in its brief (at p. 8) that jury trial is not provided in a General County Court and, as previously noted, the accused was given no choice to be tried in any court which did provide for that right. *A fortiori*, the decision below should be affirmed on this basis alone.

North Carolina may contend that the Respondent was not utterly denied any access to trial by jury by suggesting that although he was indeed placed in jeopardy of punishment exceeding a year in prison in a proceeding denying that right, he remained free *thereafter* to seek retrial de novo with the benefit of trial by jury. The contention must fail, however, for each of two reasons. First, there is simply no authority whatever for the curious view that the right to trial by jury may be postponed until after jeopardy has attached, trial has proceeded through verdict, and sentence has been imposed! So to disparage a constitutional right is wholly inconsistent with the function of its explicit guarantee. So to sanction its postponement is to hypothecate the Bill of Rights, to hobble the accused, and to subject him to the ordeal of preliminary trial the harassment of which he is powerless to avoid. It is, with all respect, an Alice in Wonderland world in which the State, as the Queen of Hearts, declares: "Sentence first, trial by jury later!"

Second, the contention must fail in any case because of the price which the state attaches to the defendant's postponed right to trial by jury—the price that he must subject himself to the risk of an unexplained and unexaminable harsher sentence should he now elect to exercise that right:

> The inevitable effect of any such provision is, of cousre, * * * to deter exercise of the Sixth Amendment right to demand a jury trial.
>
> *United States v. Jackson*,
> 390 U.S. 570, 581 (1968).

It is of no moment that the placing of this price upon the right to jury trial may not be the purpose of the state's scheme. It is enough that the price is there, and that the

defendant is made to pay it. *United States v. Jackson, supra.*

Nor is there any similarity between the defendant's predicament in this case and the Court's decision in *North Carolina v. Alford*, 91 S. Ct. 160 (1970), with respect to guilty plea bargaining. The lack of similarity arises from the fact that here there is no bargain. Compare Christie and Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 Duke Law J. 919. Had Mr. Rice pleaded guilty in the General County Court, upon advice of counsel and due record made so to assure adequate review of the voluntariness of his plea entered pursuant to an understanding that he was foreclosing jury trial in exchange for the hope of leniency, *Alford* would of course be on point. But Mr. Rice made no such plea, he entertained no such design, he stood upon his claim of innocence as he had every right to do, and nonetheless he was subjected to trial without jury. Again, had Mr. Rice a right of election, either to submit himself to the General County Court without jury but with hope of more lenient treatment than he might anticipate by electing trial by jury in superior court, or to submit to trial by jury in superior court, *Alford* might be relevant. He did not have any such choice, however, for the law of North Carolina gave him none. *Alford* is therefore wholly inapposite, and the decision is clearly controlled by *United States v. Jackson.*

Because the Respondent was deprived of right to trial by jury, and because even the postponed opportunity for jury trial was overlaid by an intimidating price, the decision in the court below must be affirmed.

Conclusion

For the Foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

William W. Van Alstyne
Counsel for Respondent

APPENDIX

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55101

WARREN SPANNAUS
ATTORNEY GENERAL

Jacob L. Safron, Esq.
Assistant Attorney General
Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

Re: *North Carolina v. Rice*
No. 1325, October Term, 1970

Dear Mr. Safron:

Thank you for your letter of April 15, 1971, relating to the above matter. I have reviewed the de novo trial situation in Minnesota, to determine whether our experience would be of any assistance to you.

As you probably know, our Supreme Court, in *State v. Holmes*, 281 Minn. 194, 161 N.W.2d 650 (1968) held that it was improper, as a matter of judicial policy, "for the court to impose on a defendant who has secured a new trial a sentence more onerous than the one he initially received." 281 Minn. at 296. The Court expressly refrained from deciding whether the rule applies in de novo trial situations such as were involved in the *Rice* case.

Approximately one-third of all misdemeanor trials in Minnesota are held in Hennepin County (which embraces Minneapolis). In that county, our statutes provide that a defendant is entitled to a jury trial in municipal court only for certain specified offenses, such as driving under the influence of an alcoholic beverage. A defendant who is denied a trial by jury may obtain a jury trial, de novo, in district court. M.S.A. § 488A.10, subd. 6.

Although I understand that the Hennepin County District Judges have not been imposing heavier penalties upon defendants convicted following a de novo trial, the statistics

for 1970 provided by Mr. S. Allen Friedman, the Hennepin County Court Administrator, reflect that no flood of appeals has occurred:

Type of Trial	Number of Trials	Number of de novo Trials	De novo trials as a percentage of total
Criminal	2,257	46	.02
Traffic	5,208	57	.01

I also have some doubt as to the propriety of using the sentencing process to effect improvements in the court calendar. Sentencing, it seems to me, has not been designed as a tool to promote efficiency in the courts.

Where the de novo trial is a right created solely by the legislature, it would seem that that body should enact further legislation to resolve any problems resulting from the creation of the right, rather than delegating to the courts the *ad hoc* power to inflict on some (but not necessarily all) defendants a more severe punishment, for the sole purpose of deterring some future defendants from exercising their statutory rights. And in those cases (such as Hennepin County) where the de novo jury trial must be provided as a matter of constitutional mandate, deterring appeals by use of heavier sentences would seem to run afoul of *North Carolina v. Pearce*, 395 U.S. 711 (1969).

If you have extra copies of your brief, I would be interested in reviewing it. Because of the doubts I have expressed, and because our statistics do not provide support for your position, it does not appear that we will be able to join it.

Very truly yours,

Warren Spannaus
Attorney General

WS:lrl

cc: William W. Van Alstyne
Professor of Law
Duke University
Durham, North Carolina

RY
SUPREME COURT, U. S.
MOTION FILED
OCT 2 1971

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

~~No. 1325~~ 70-77

North Carolina,

Petitioner

v.

Wayne Rice,

Respondent

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit.

Motion For Leave To File As Amicus Curiae and Brief of Amicus Curiae

Prison Research Council
pro se
John M. Myers, Chairman
Jonathan L.F. Silver
University of Pennsylvania
Law School, Philadelphia, Pa.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1325

North Carolina,

Petitioner

v.

Wayne Rice,

Respondent

On Certiorari From The United States Court of Appeals For The Fourth Circuit.

Motion For Leave To File As Amicus Curiae

The Prison Research Council, pro se hereby respectfully moves for leave to file the attached brief as amicus curiae in the above-captioned case.

1. The Prison Research Council was formed in the summer of 1966 under the auspices of the University of Pennsylvania Law School. The Prison Research Council answers questions of prison inmates throughout the nation, relating to the validity of their convictions under the applicable law. The Prison Research Council is staffed by law students, originally under the direction of Curtis R. Reitz, Professor of Law, and currently under the supervision of Richard L. Bazelon, Esq., Philadelphia, Pennaylvania. Since the Council is composed of students and includes no member of the Supreme Court Bar, this Motion is filed pro se.

2. The Prison Research Council has assisted more than 2500 inmates in more than 31 state prisons and many of the federal penitentiaries. Mr. Justice Douglas recognized the work of the Council in Johnson v. Avery, 393 U.S. 483 (1969) (concurring opinion).

3. The Prison Research Council did not become aware of this Court's grant of certiorari in North Carolina v. Rice until the time for filing as amicus curiae by consent of the parties under Supreme Court Rule 42(2) had expired. However we wish to advise the Court that attorneys for petitioner and respondent have consented to the appearance of the Prison Research Council as amicus curiae. Copies of their letters are attached to this motion.

4. The Prison Research Council has received requests for assistance from inmates in state prisons whose cases present questions closely related to those presented by the instant case. This Court's disposition of the instant case will

vitally affect the rights of these inmates. We believe that the Prison Research Council can contribute relevant discussion on points not fully developed by the parties in their respective briefs. We advert specifically to:

A. The affect of the decision below on the administration of justice in North Carolina.
B. The precedential affect of North Carolina v. Pearce, 395 U.S. 711 (1969).
C. The relevance of the instant case to those in fact deterred by the state procedure involved herein.

Respectfully Submitted,

Prison Research Council
pro se.
John Myers, Chairman
Jonathan L.F. Silver

University of Pennsylvania
Law School
Philadelphia, Pa.

ROBERT MORGAN
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. Box 629
Raleigh
27602

September 17, 1971

Mr. John Myers, Chairman
Prison Research Council
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

Dear Mr. Myers:

Enclosed is a copy of the brief for the State of North Carolina filed in the Supreme Court of the United States in NORTH CAROLINA v. RICE. Mr. Jacob L. Safron and I are handling the above case and will not oppose your submitting an amicus brief to the Court. However, since the briefs of both parties have already been filed, it would appear that the filing of an amicus brief would have to be by order of the Court under Rule 42(2).

If we can be of any further assistance, please contact.

Very truly yours,

ROBERT MORGAN
Attorney General

Edward L. Eatman, Jr.
Staff Attorney

ELEjr/mp

Enclosure

Duke University
DURHAM, NORTH CAROLINA

SCHOOL OF LAW

POSTAL CODE 27706

September 21, 1971

Mr. John M. Myers, Chairman
Prison Research Council
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pa. 19104

Dear Mr. Myers:

I am happy to consent to your request to enter an appearance in Rice v. North Carolina, currently pending in the Supreme Court. My brief in behalf of respondent was due on June 20, 1971, and it was filed on June 18, 1971. No reply brief was filed by the State. Enclosed for your information is a copy of my brief.

Assuming that you may seek leave to file as amicus curiae, I would be grateful to receive a copy of your brief.

Sincerely,

William Van Alstyne

WVA:js
Enclosure

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1325

North Carolina,

Petitioner

- v. -

Wayne Rice,

Respondent

On Certiorari From the United States Court of Appeals For the Fourth Circuit.

BRIEF FOR THE PRISON RESEARCH COUNCIL AS AMICUS CURIAE

Question Presented

Whether the court below correctly concluded that the state denies due process of law when it imposes an unexplained harsher sentence upon a defendant after the defendant obtains a new trial pursuant to the state's appeal procedures, when those procedures grant trial de novo upon defendant's application.

Interest of the Prison Research Council

The Prison Research Council has received a request for assistance from inmates in state prisons whose cases present questions very closely related to those presented in North Carolina v. Rice. This Court's disposition of this case will vitally affect their rights.

Argument

I. THE DECISION IN THE COURT BELOW IS CORRECT.

A. North Carolina v. Pearce applies to the trial de novo situation.

The trial de novo in the Superior Court is just as much a retrial as was the second trial in North Carolina v. Pearce, 395 U.S. 711 (1969).

The State's attempt to distinguish this case from North Carolina v. Pearce, supra, fails. The State claims that the language of Pearce shows that the decision was meant to apply only to retrials. (State's Brief, p.7). Then the brief asserts that the procedure presently before the Court is a trial de novo. Therefore, the argument concludes, Pearce need not apply. The difficulty with that attempted syllogism is that the conclusion completely begs the question. The question is, is the trial de novo procedure sufficiently like the retrial procedure, such that the Pearce safeguard should apply. It proves nothing to say that different labels are used for the two procedures. The State's attempt to distinguish the two procedures goes no further than to point out that the labels differ.

All retrials are really trials de novo whether ordered by a court because of error at the first trial, or whether granted by statute without proof of error at the first trial. The second trial in both Pearce and the present case followed the same form and were subject to the same Constitutional and state rules. Pearce had as much of a trial de novo as did Rice. The difference lies in the authority which granted the two trials, not the trials themselves. That difference is not a distinction here, if it ever could be. As the Indiana Supreme Court reasoned when it applied Pearce to a situation similar to the one now before this court,

> There is no difference between the proceedings in a retrial obtained by order of this Court on appeal and those of a retrial in criminal or circuit court obtained by exercise of a statutory right to appeal from a magistrate or justice of the peace court. In both instances the retrial is de novo...Eldridge v. State, ___ Ind. ___, 267 N.E.2d 48 (1971).

Pearce states a rule which applies to trials, not appeals. Pearce says that a trial judge can give a harsher sentence on a second trial for the same crime only if he states as reasons, events in the defendant's behavior which occurred subsequent to the date of the first sentence. 395 U.S. at 726. Nowhere in Pearce is there any indication that the limitation placed on the trial judge depends on why a second trial was necessary. The form of the appeal procedure in a particular case has nothing to do with the reasons for this Court's holding in Pearce, because the appeal procedures did not affect the trial de novo in that case. They should not affect this case either.

B. The statistics cited by the State to support its arguments fail to add relevant information to the serious consideration of the issues involved.

It is altogether too easy to view a case of this nature only in terms of the system as a whole. The "effect on the administration of justice" approach can often make compelling facts and arguments that in the final analysis are not weighty at all. Prediction on however tenuous a ground becomes a powerful tool for argument, and the "numbers game" takes on far greater weight than it should be accorded.

The state of North Carolina sets down some statistics in its brief (at p.12) for the benefit of the court. The numbers game undertaken in the guise of analysis is more misleading than helpful to a thoughtful consideration of the real issues involved here. The state reports that from 343,000 trials in the county courts there are 17,000 appeals for trial de novo in the Superior Court, and that these appeals comprise something over half of the case load of that court. The 5% appeal rate accounts for 57% of the Superior Court cases. In "projecting" figures for this court's consideration the state indulges in an in terrorem argument that we find at best not helpful, and at worst rather deceitful. The State proceeds to tell the Court that if the number of appeals increases by 1%, the Superior Court caseload will increase by 12% and thus a 10% increase in appeals would more than double the present caseload of the State Superior Courts.

That the figures and percentages are correct is not questioned here; what we urge is that the comparison developed by the state is not the most relevant to develop, even though it does give the most credence to their argument..

The results of these same figures can be stated other ways with the same amount of "truth". For example, if the number of "appeals" from the decision of the county courts were to go to 300% of the current level, then the Superior Court caseload would go up only 120%. The point is that the state in its figures is taking one or ten percent of the total number of cases in the county court, while in our example we used the percentage figure as a percentage of present appeals. The state thus conceals its rather startling assumption that appeals will triple if Rice should prevail. There is no basis laid by the state for such an assumption.

The point is not that one set of figures is more correct than the others. We simply urge that neither example can be used in any way to suggest a simple solution to a problem which involves far more than the caseload factor. The spectre of the overburdened system is too easily conjured up, and too readily used as justification for the existing procedure. The figures in reality point up only what should be a completely obvious point, that more appeals (however great or small that number may be) would mean more cases to be handled in the Superior Court. This is neither surprising, nor in any way dispositive of the issues presented.

C. Reversal would create an unjust opportunity for prosecutorial discrimination.

It is contended that a result such as the State of North Carolina urges in the instant case would create a situation in that state which goes to point up the illogic of the entire situation and argument presented by the state. In the court below, the Rice decision was joined by another case with a petitioner who was in a similar but not identical situation. In Woods v. Ross 434 F.2d 297 (4th Cir. 1970), the companion case to North Carolina v. Rice, the defendant had been convicted of a misdemeanor at the County Court level. By appealing he gained the doubious privilege of being tried on the felony charge of which the misdemeanor had been a lesser included offense. The Court of Appeals reversed this conviction on the grounds that having tried Woods as a misdemeanant, it would violate principles of due process and double jeopardy to raise the charge to a felony on appeal. 434 F.2d at 299. By not appealing this decision, the state of North Carolina would seem to concede its correctness. But regardless whether in fact the state so concedes, the effect of its decision to appeal only the Rice decision points up at least an inconsistency in its view toward its own procedures.

If the state were to have its way here, defendants would find themselves in an odd position in that their rights to review subsequent to the county court "trial" would be dependent on the route taken by the prosecutor in their particular case, and little else. An example will best point up the situation that might result:

A and B each commit the identical crime, carrying a two year maximum.[1] Each would also be subject to prosecution on a lesser included offense carrying a maximum sentence of only one year. Defendant A is prosecuted for the greater offense, is found (or pleads) guilty, and is sentenced to a one year sentence. Defendant B is prosecuted for the lesser included offense, is found (or pleads) guilty, and is sentenced to the one year maximum. Were North Carolina to successfully argue the present case, defendant B could appeal and get a constitutional trial de novo without risking a harsher sentence as a result, while defendant A could appeal only if he were willing to assume the risk of a doubly harsh sentence if convicted.[2]

---

1. Thereby vesting original exclusive jurisdiction over both defendants in the district court. N.C.G.S. §§7-278, 14-361, (1969 1970 Supp.)

2. Since the majority of convictions are obtained by Guilty Pleas, many resulting from the Plea Bargaining Process, it is important to note the effect of this situation on the plea bargained defendant. There are two possibilities: a bargain for a lighter sentence on the original charge, and a bargain for a reduced charge. In offering only the lighter sentence as his part of the bargain, a prosecutor could prevent the defendant from retaining the benefit of his bargain should he later attack his plea collaterally. This would clearly violate the principle, if not the rule of Simpson v. Rice, 395 U.S. 711 (1969), the companion case to Pearce, supra.

The result is extraordinary, and we would argue, highly undesirable, since it would enable the prosecuter, in his unbridled discretion, to set the price for appeal, and trial by jury. We know of no precedent which would support such a discretionary pricing procedure where constitutional rights are at stake! North Carolina is in the posture here of arguing to this court that while increasing a charge from misdemeanor to felony may be too high a price to put on the right to appeal Wood v. Ross, supra merely increasing the sentence (but not the charge) is not too high a price. The distinction suggested is, at best, no distinction.

II. DEFENDANTS CONVICTED IN NORTH CAROLINA'S GENERAL COUNTY COURTS WHO FAILED TO APPEAL FOR A TRIAL DE NOVO ARE ENTITLED TO A HEARING TO DETERMINE WHETHER THEIR FAILURE TO APPEAL WAS DUE TO A FEAR OF INCREASED PUNISHMENT UPON RECONVICTION.

Whatever else may be said of this Court's holding in North Carolina v. Pearce, 395 U.S. 711 (1969), it is clear that the Court's concern centered around the deterrent effect felt by defendants made aware of the "fact" that they could receive harsher sentences on retrial if they managed to have their convictions overturned. The court stated it this way:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a

> defendant's exercise of the right to appeal or collaterally attack his first conviction due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. 395 U.S. at 725. (emphasis supplied).

The following argument examines this unconstitutional deterrent as it exists in the trial de novo context.

This Court's decision in this case will affect the constitutional rights of at least one class of persons in a situation parallel to, but slightly different from, respondent Rice. The class consists of those who have in fact been deterred from taking an appeal after the North Carolina General County Court trial just because of the procedure which penalized Rice for exercising his right. While the posture of this case would allow a decision relating solely to those defendants who did in fact appeal and were penalized for doing so, amicus feels that to so decide would be on the one hand to recognize the effect of putting a price on constitutional rights but on the other, to fail to afford relief to those who would not pay the unconstitutional price. It is the Court, and not counsel, who has framed the issue this way: "A defendant's exercise of a right of appeal must be free and unfettered". Worcester v. Comm., 370 F.2d 713, 718 (1st Cir. 1966) quoted in North Carolina v. Pearce, supra, at 724.

In urging that the remedy afforded Rice here should go to those deterred as well as to those punished in the North Carolina "appeal"

process we take a position similar to a majority of this Court in Fay v. Noia 372 U.S. 391 (1963). In that case defendant Noia failed to perfect an appeal from his first degree murder conviction due to a realistic fear that he would receive a harsher penalty upon revonviction. This Court held those circumstances sufficient to excuse Noia from compliance with New York's time limit for perfection of an appeal. Hence, Noia's failure to appeal was held not to prejudice his petition for habeas corpus 20 years later.

The position of amicus in the case at bar is that the failure of defendants who were convicted in North Carolina's General County Courts to comply with North Carolina's time requirement for perfecting an appeal ought not to be prevented from receiving the benefits of a decision for respondent Rice in the present case, if their failure to comply with the state procedural rule was due to a realistic fear that they might receive a harsher sentence in the Superior Court. Fay v. Noia, supra, stands for the proposition that Federal constitutional rights, such as the right to trial by jury, cannot be so waived; and to the extent that this fear precluded defendants from pursuing their federal constitutional rights by appealing for a constitutional trial de novo, Noia stands for the proposition that they, as well as those in the position of Rice himself, are entitled to relief. The articulated purposes of North Carolina v. Pearce, supra, cannot be effectuated without such a holding. Amicus is not unmindful of the State's and this Court's legitimate concern for the increased burden that the suggested ruling would place on the courts of North Carolina. However, it is submitted that in this instance such concern is unwarranted because the burden simply will not be heavy at all.

First, the number of cases involved is not large. The jurisdiction of the General County Courts is limited to misdemeanors and further restricted to those misdemeanors which are punishable by not more than two years imprisonment. N.C.G.S. §§7-278(4) (1970 Supp), 14-3(a), (1969). Thus, the number of people originally tried in those courts is limited. The number of convictions is surely less than the number tried. Since the maximum punishment is two years imprisonment, it is only those convicted over the last 2 years that would really be affected. Since many of those convicted undoubtedly receive less than two years, the number of cases actually subject to review will be an even smaller number. Furthermore to the extent that those who do get two years or a term approaching it are more likely to take the case to Superior Court, the class affected is further limited. Finally since the procedure would only be available for those convicted defendants who ask for it, only a percentage of the group eligible for review will in fact be reviewed.

Second, the state's ability effectively to retry those who are entitled to trial de novo will not have been substantially impaired by the passage of time, since no case can be more than two years old. Many cases will have aged for less than that. Documents and witnesses should be readily available.

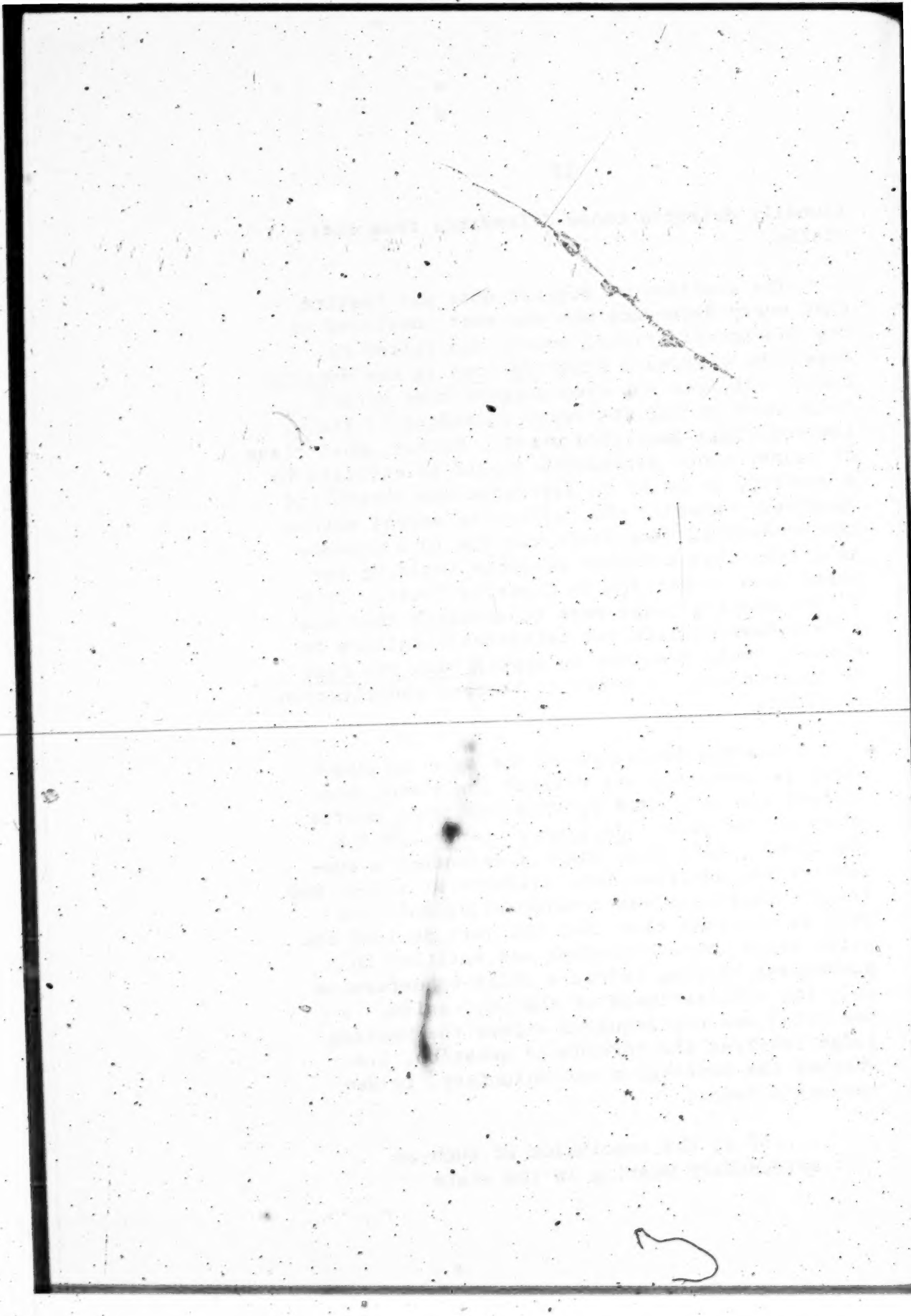
The holding suggested will not require the state to mount prosecutions in cases that are decades old, see Gideon v. Wainwright 372 U.S. 335 (1963), and will not impose a heavy burden on the state or judicial machinery, see Brady v. U.S. 397 U.S. 742 (1970). It will vindicate the constitutional rights of a limited class of misdemeanants, rights which the state has unconstitu-

tionally deterred those defendants from exercising.

The position we suggest does not require that every defendant who was ever convicted in the non-constitutional courts and failed to appeal be granted a trial de novo in the Superior Court. It does not even suggest that such a trial must be had for every defendant in the limited class described above. Rather, that class of county court defendants should be entitled to a hearing, in order to determine the threshhold question: whether the failure to appeal within the prescribed time limit was due to a reasonable fear that a higher sentence would be imposed upon conviction in Superior Court. Only if the hearing judge were to conclude that such a fear does explain the defendant's failure to appeal, would granting an appeal nunc pro tunc be appropriate, in order to restore constitutional rights.

A hearing procedure of the type outlined above is certainly not without precedent, and in fact has been used by this and other courts often in the past. Jackson v. Denno 378 U.S. 368 (1964), held that where a defendant's confession was admitted into evidence at trial, and its voluntariness was considered by only the jury at the same time that the jury decided the guilt issue, then defendant was entitled to a subsequent hearing before a judge to determine only the voluntariness of the confession. A new trial was not required unless the hearing judge resolved the threshhold question, i.e. whether the confession was voluntary, in defendant's favor:

> ....if at the conclusion of such an evidentiary hearing in the state



> court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial... 378 U.S. at 394.

Similarly, the successful defendants in United States v. Wade 388 U.S. 218, 242 (1967), and Gilbert v. California 388 U.S. 263, 272, obtained only vacations of their sentences pending evidentiary hearings in lower courts. The purpose of the hearings to which Wade and Gilbert were entitled was to determine whether the identification evidence admitted at trial was so tainted by the illegal lineup procedures that had occurred, as to be inadmissible. A new trial was necessary only if such a taint (constitutional error) existed.

People v. Montgomery, 24 N.Y.2d 130, 299 N.Y.S.2d 156, 247 N.E.2d 110 (1969) and People v. Welsh, 35 A.D.2d 854, 315 N.Y.S.2d 256 (App. Div. 1970), are further examples of the type of relief suggested. In those cases the highest court of New York established a hearing procedure to determine whether a defendant's allegation that his lack of appeal was due to the failure of counsel to advise him of this right, was true. If, at the conclusion of the hearing the judge sustained defendant's position, an appeal nunc pro tunc would be granted. See People v. Ali, 35 A.D.2d 435, 317 N.Y.S.2d 377 (App. Div. 1970), That is precisely the procedure we suggest here. If at a state court hearing it is determined that the failure of a defendant to give timely notice of request for a Superior Court trial de novo was due to the legitimate fear of

receiving a higher sentence, then his right to appeal should be reinstated.

We are aware that this Court has rejected a position that appears to be superficially analagous to the one we urge. Brady v. United States 397 U.S. 742 (1970); McMann v. Richardson 397 U.S. 759 (1970).

In Brady, supra, the Court held that a conviction based on a voluntary plea of guilty could not be attacked at a later date, even though a strong force influencing the plea was a desire to avoid the death penalty. This, even though it was later held, in United States v. Jackson 390 U.S. 570 (1968), that had the death penalty been imposed at trial, it would not have been constitutional.

In McMann, supra, it was held that by pleading guilty and thereby not attacking the validity of a disputed confession, a defendant waived the right to object to the confession later, as long as the plea was voluntary. Thus, even where it was undisputed that the confession could not constitutionally have been admitted at trial, a defendant who pled guilty was not entitled to relief on habeas corpus.

On the surface, the analogy may seem appealing, but it fails drastically in that at the initial level of decision-makeing for the defendant involved, the constitutional safeguards inherent in the McMann and Brady situations are simply not present in the North Carolina county courts.

1) The procedures followed in the county courts mark them as at least a notch below Constitutional courts. The state concedes (at p.8

of its brief) that there is no right to be tried by a jury. There is no record made of the trial and thus no means of review of errors made at this initial proceeding.

2) The decision to be tried in county court is not a knowing and voluntary decision made by the defendant, nor is it in any sense a waiver of his constitutional rights. The exclusive original jurisdiction over non-felony cases carrying a two year or less maximum is vested in the district court. N.C.G.S. §§7-278, 14-3(a), supra.

3) It should be further noted that Brady and McMann both dealt with situations in which Guilty Pleas were peculiarly involved. Thus another very great concern of the Court was the importance of the Guilty Plea in the administration of justice and the importance of maintaining the vitality of guilty pleas from years past.

In Brady the Court listed several legitimate advantages which accrue to the state from the guilty plea process:

> ...the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. 395 U.S. at 752.

The problem is far different here. First, whether a defendant has pled guilty or not guilty is of no concern here, since in either case he would have a right to the trial de novo.

Second, the Court need not worry about the vitality of pleas that are 7-14 years old as it did in McMann and Brady. Third, as demonstrated above, the class of defendants affected would be small. Thus the concerns for the administration of justice which lay behind the decisions in McMann and Brady are not present here.

While in the McMann and Brady situations there is at least assurance that the defendant was treated in a constitutional manner, there is no such assurance for the North Carolina misdemeanant defendant. In the present case, the State of North Carolina has established a mandatory system in which the defendant is induced to waive due process rights in the wake of the proceedings of a subconstitutional court. McMann and Brady simply do not apply to such a situation.

Conclusion

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

Prison Research Council,
pro se

John M. Myers, Chairman
Jonathan L. F. Silver

University of Pennsylvania
Law School
Philadelphia, Pa.

NORTH CAROLINA *v.* RICE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 70-77. Argued October 12, 1971—Decided December 14, 1971

Respondent was convicted in a General County Court in North Carolina of driving while intoxicated and was sentenced to nine months' imprisonment and payment of a fine. On appeal, he was tried *de novo* in the Superior Court, found guilty, and given a two-year sentence. The District Court denied habeas corpus, and respondent, who by then had been completely discharged from prison, appealed to the Court of Appeals. That court, relying on *North Carolina* v. *Pearce*, 395 U. S. 711, held that the case was not mooted by respondent's discharge, and that respondent was entitled to have the record of his conviction expunged. *Held: North Carolina* v. *Pearce*, *supra*, does not require that respondent's conviction be invalidated but only that he be resentenced if the higher sentence imposed after the *de novo* trial was vulnerable under *Pearce*. Since the present record deals with the mootness issue only from the standpoint of conviction *vel non* and does not reveal whether, under state law, benefits accrue to respondent in having his sentence reduced after he has served it, the case is remanded for reconsideration of the mootness question.

434 F. 2d 297, vacated and remanded.

Jacob L. Safron, Assistant Attorney General of North Carolina, argued the cause for petitioner. With him on the brief was *Robert Morgan*, Attorney General. Joining in and adopting the brief were the Attorneys General for their respective States as follows: *Gary K. Nelson* of Arizona, *Ray Thornton* of Arkansas, *Robert L. Shevin* of Florida, *Theodore L. Sendak* of Indiana, *Vern Miller* of Kansas, *John B. Breckinridge* of Kentucky, *James S. Erwin* of Maine, *Francis B. Burch* of Maryland, *A. F. Summer* of Mississippi, *Robert L. Woodahl* of Montana, *Clarence A. H. Meyer* of Nebraska, *Helgi Johanneson* of North Dakota, *Crawford C. Martin* of Texas, *Vernon B. Romney* of Utah, and *Andrew P. Miller* of Virginia.

William W. Van Alstyne argued the cause and filed a brief for respondent.

Briefs of *amici curiae* urging reversal were filed by *John W. Benoit, Jr.*, Deputy Attorney General, for the State of Maine, and by *Vernon B. Romney*, Attorney General of Utah, *pro se*.

The Prison Research Council filed a brief as *amicus curiae* urging affirmance.

PER CURIAM.

On July 2, 1968, respondent Rice was arrested for driving while intoxicated on a North Carolina state highway. He was tried in the General County Court of Buncombe County, convicted, and sentenced to imprisonment for nine months with sentence suspended upon payment of $100 fine and costs. On appeal, he was tried *de novo* in the Superior Court, found guilty, and sentenced to two years' imprisonment. State post-conviction procedures were unavailing. On appeal from denial of federal habeas corpus, the Court of Appeals for the Fourth Circuit held that under *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), "the more drastic sentence on the second trial [was] a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal." 434 F. 2d 297, 300 (1970). Although "[h]e was completely discharged by North Carolina on January 24, 1970 . . . this did not moot the case on habeas corpus" because injurious consequences from the conviction might still obtain. *Ibid.* The judgment was that Rice was entitled to have the record of his conviction expunged. The State's petition for writ of certiorari was granted. 401 U. S. 1008 (1971).

The State claims that *Pearce* does not apply to a situation where the more severe sentence is imposed after a trial *de novo* in its Superior Court. We do not reach that question, however, since the threshold issue of moot-

ness was improperly disposed of by the Court of Appeals. Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority. Early in its history, this Court held that it had no power to issue advisory opinions, *Hayburn's Case*, 2 Dall. 409 (1792), as interpreted in *Muskrat* v. *United States*, 219 U. S. 346, 351–353 (1911), and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, 367 (1960). To be cognizable in a federal court, a suit "must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). However, "[m]oot questions require no answer." *Missouri, Kansas & Texas R. Co.* v. *Ferris*, 179 U. S. 602, 606 (1900). Mootness is a jurisdictional question because the Court "is not empowered to decide moot questions or abstract propositions," *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920), quoting *California* v. *San Pablo & Tulare R. Co.*, 149 U. S. 308, 314 (1893); our impotence "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306 n. 3 (1964). See also *Powell* v. *McCormack*, 395 U. S. 486, 496 n. 7 (1969). Even in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction. *Henry* v. *Mississippi*, 379 U. S. 443, 447 (1965). *Liner* v. *Jafco, Inc.*, *supra*, at 304.

The Court of Appeals held that the case was not moot because it assumed that *Pearce* mandated expunction of Rice's conviction and because the conviction, unexpunged, would have collateral consequences entitling Rice to challenge it. A number of disabilities may attach to a convicted defendant even after he has left prison,[1] and the Court has recognized the standing of such persons to challenge the legality of their conviction even when their sentence has been served.[2] It could not be clearer, however, that *Pearce* does not invalidate the conviction that resulted from Rice's second trial; *Pearce* went no further than to affirm the judgment of a federal court ordering Pearce's release "[u]pon the failure of the state court to *resentence* Pearce within 60 days . . . ." 395 U. S., at 714. (Emphasis added.) *Pearce*, in short, requires only resentencing; the conviction is not *ipso facto* set aside and a new trial required. Even if the higher sentence imposed after Rice's trial *de novo* was vulnerable under *Pearce*, Rice was entitled

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[1] A convicted criminal may be disenfranchised, cf., *e. g.*, Mont. Const., Art. IX, § 2; Mont. Rev. Codes Ann. § 23-302 (1967); Okla. Const., Art. III, § 1; Okla. Stat. Ann., Tit. 26, § 93.1 (Supp. 1971-1972); lose the right to hold federal or state office, cf., *e. g.*, Del. Const., Art. 2, § 21; 18 U. S. C. § 204; be barred from entering certain professions, 7 U. S. C. § 12a (2)(B); D. C. Code Ann. §§ 47-2301 to 47-2350 (1967); be subject to impeachment when testifying as a witness, Ark. Stat. Ann. § 28-605 (1962); Ore. Rev. Stat. § 44.020 (1963); be disqualified from serving as a juror, Idaho Const., Art. 6, § 3, Idaho Code § 2-202 (1948); Nev. Const., Art. 4, § 27, Nev. Rev. Stat. § 6.010 (1967); and may be subject to divorce, W. Va. Code Ann. § 48-2-4 (Supp. 1971). See generally Comment, Civil Disabilities of Felons, 53 Va. L. Rev. 403 (1967); Note, The Effect of Expungement on a Criminal Conviction, 40 S. Cal. L. Rev. 127 (1967).

[2] *Pollard* v. *United States*, 352 U. S. 354, 358 (1957); *United States* v. *Morgan*, 346 U. S. 502, 512-513 (1954); *Fiswick* v. *United States*, 329 U. S. 211, 222 (1946); *Carafas* v. *LaVallee*, 391 U. S. 234, 237-240 (1968).

neither to have his conviction erased nor to avoid the collateral consequences flowing from that conviction and a proper sentence.

Respondent's sole claim under *Pearce* thus related to the sentence he had completely served when he came before the Court of Appeals. A different question of mootness is therefore presented than the Court of Appeals considered. Nullification of a conviction may have important benefits for a defendant, as outlined above, but urging in a habeas corpus proceeding the correction of a sentence already served is another matter. Respondent was first sentenced to nine months, suspended upon payment of a $100 fine; after trial *de novo* he was sentenced to two years. In some jurisdictions, if a defendant is adjudicated guilty, either by conviction or plea, and then is placed on probation, not sentenced, or given a suspended sentence, statutes imposing disabilities for criminal convictions have no application.[3] Elsewhere, however, the sentencing that follows adjudication of guilt is irrelevant for purposes of disability statutes.[4] Since the present record deals with the mootness question only from the standpoint of conviction *vel non* and is otherwise unilluminating as to whether there may be benefits to respondent under North Carolina law in having his sentence reduced after he has served that sentence, it would be inappropriate for us to deal with this issue as it has now emerged. Accordingly, we vacate the judgment of the Court of Appeals and remand the case to that court for reconsideration of the question of mootness.

So ordered.

MR. JUSTICE DOUGLAS would affirm the judgment below on the opinion of the Court of Appeals in 434 F. 2d 297.

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[3] See Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 954 n. 97 (1970).

[4] *Ibid.*